Supreme Court, U.S.
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In The
Supreme Court of the United States

IGT a/k/a IGT-NORTH AMERICA,

Petitioner,

v.

COLLINS MUSIC CO., INC.,

Respondent.

On Petition For Writ Of Certiorari To The South Carolina Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did South Carolina deny IGT due process of law in violation of the Fourteenth Amendment of the Constitution of the United States when it held out a clear and certain avenue for judicial review and then, in midcourse, shut the appellate-courthouse door on IGT?

2. Does the subjective and indeterminate test adopted by the South Carolina Court of Appeals for determining whether a putative South Carolina Rule of Civil Procedure 59(e) ("Rule 59(e)") motion is an "appropriate" Rule 59(e) motion that stays the running of the time for appeal create "unreasoned distinctions that can only impede open and equal access to the courts" in violation of federal due process and equal protection requirements?

PARTIES TO THE PROCEEDING BELOW

Collins Music Co., Inc. ("Collins") either changed its name or comp[illegible]d a corporate reorganization while the case was pending. The entity that appeared at trial was Collins Entertainment Corporation. IGT changed its name to IGT-North America at one point in its corporate history. IGT has since changed its name back to IGT.

CORPORATE DISCLOSURE STATEMENT

IGT, a Nevada corporation, is a wholly-owned subsidiary of International Game Technology. International Game Technology, also a Nevada corporation, is a publicly traded corporation.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING BELOW	ii
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES	v
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS AND ORDERS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
1. FACTUAL AND PROCEDURAL BACKGROUND	2
2. THE SOUTH CAROLINA SUPREME COURT'S JUNE 25, 2003, ORDER "DISMISSING" THE SECOND PETITION DOES NOT PREVENT REVIEW BECAUSE IT RESTS ON AN INADEQUATE STATE PROCEDURAL GROUND	6
REASONS FOR GRANTING PETITION	13
1. THE COURT SHOULD GRANT THE PETITION TO DETERMINE WHETHER FEDERAL DUE PROCESS PREVENTS A STATE COURT FROM CLOSING A CLEARLY ESTABLISHED AVENUE OF JUDICIAL REVIEW WITHOUT FAIR WARNING	14

TABLE OF CONTENTS – Continued

Page

2. THE COURT SHOULD GRANT THE PETITION TO DETERMINE IF AN INDETERMINATE AND SUBJECTIVE TEST FOR DECIDING WHETHER A POST-TRIAL MOTION STAYS THE TIME FOR APPEAL DEPRIVES LITIGANTS OF DUE PROCESS AND EQUAL PROTECTION OF THE LAWS, WHERE APPLICATION OF THE RULE CAN LEAD TO ARBITRARY AND RANDOM RESULTS 19

CONCLUSION 22

INDEX TO APPENDIX ..... App. i

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Aiken, Speir Inc. v. Henry, 486 S.E.2d 492 (S.C. 1997) 5, 9, 11, 12

Barr v. City of Columbia, 378 U.S. 146 (1964) 8

Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673 (1930) 16

Cabrera v. Barbo, 175 F.3d 307 (3d Cir. 1999) 8, 10 n.10

Cox v. Louisiana, 379 U.S. 559 (1965) 18

Ford v. Georgia, 498 U.S. 411 (1991) 7, 8, 9, 10 n.10

George v. Camacho, 119 F.3d 1393 (9th Cir. 1997) 13, 17, 18, 19

Harris v. Reed, 489 U.S. 255 (1989) 7

James v. Kentucky, 466 U.S. 341 (1984) 8

Johnson v. Mississippi, 486 U.S. 578 (1988) 7

Lee v. Kemna, 534 U.S. 362 (2002) 7

Missouri v. Jenkins, 495 U.S. 33 (1990) 10 n.9, 12

Moses v. South Carolina Highway Dep't, 187 S.E.2d 888 (S.C. 1972) 12

N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958) 7, 8

Noisette v. Ismail, 403 S.E.2d 122 (S.C. 1991) 14 n.13

Parker v. Shecut, 531 S.E.2d 546 (S.C. Ct. App. 2000), *reversed on other grounds*, 562 S.E.2d 620 (S.C. 2002) 15 n.14, 18

Quality Trailer Prods. Inc. v. CSL Equip. Co., 562 S.E.2d 615 (S.C. 2002) 15

TABLE OF AUTHORITIES – Continued

Page

Reich v. Collins, 513 U.S. 106 (1994).....16

Raley v. Ohio, 360 U.S. 423 (1959).....18

Rinaldi v. Yeager, 384 U.S. 305 (1966).....19

Sundstrom v. United States, 419 U.S. 934 (1974).....18

Van Blarcum v. City of N. Myrtle Beach, 523 S.E.2d 486 (S.C. Ct. App. 1999)..... 14 n.13

Walker v. Bluffs Apartments, 477 S.E.2d 472 (S.C. Ct. App. 1996).....3 n.2, 14 n.13, 18

Wooten v. South Carolina Dep't of Transp., 511 S.E.2d 355 (S.C. 1999) 3 n.3

Zauderer v. Office of Discipline, 471 U.S. 626 (1985).....18

CONSTITUTIONAL, STATUTORY PROVISIONS, AND COURT RULES

28 U.S.C. § 1257(a) 1

South Carolina App. Ct. R. 203(b)(1)..... 14 n.12

South Carolina App. Ct. R. 221(a)..... 9

South Carolina App. Ct. R. 226(a).....5, 9, 11

South Carolina App. Ct. R. 226(c) 5, 9, 11, 12

South Carolina R. Civ. P. 59(e) .....*passim*

U.S. Const. amend. XIV, § 1..... 2

U.S. Sup. Ct. R. 10(c).....13

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS AUTHORITIES

Jill E. Fisch, *Retroactivity and Legal Change: Equilibrium Approach*, 110 Harv. L. Rev. 1055 (1997).....16

Catherine T. Struve, *Direct and Collateral Court Review of the Adequacy of State Procedural Rules*, 103 Colum. L. Rev. 243 (2003)..... 7

Kermit Roosevelt III, *A Little Theory is a Dangerous Thing: The Myth of Adjudicative Retroactivity*, 13 Conn. L. Rev. 1075 (1999).....13

Petition for Writ of Certiorari, *IGT v. Collins*, Docket No. 03-143 (U.S. S. Ct. filed July 22, 2003).....2 n.1, 5 n.6, 20, 20 n.16

PETITION FOR WRIT OF CERTIORARI

Petitioner IGT respectfully petitions for a writ of certiorari to review the judgment of the South Carolina Court of Appeals (the "Court of Appeals") in this case.

OPINIONS AND ORDERS BELOW

The order of the Supreme Court of South Carolina (the "South Carolina Supreme Court") "dismissing" IGT's state petition for discretionary review in this case is not reported. *See* App. at 17-23. The Court of Appeals' opinion dismissing IGT's appeal is reported at 353 S.C. 559 and 579 S.E.2d 524. *See* App. at 1-10.

JURISDICTION

The Court of Appeals entered its order dismissing IGT's appeal on September 4, 2002 (the "Order"). The South Carolina Supreme Court issued an order declining discretionary review of IGT's first state petition for a writ of certiorari on April 24, 2003. Then, the Court of Appeals denied IGT's petition for rehearing on May 12, 2003, and the South Carolina Supreme Court "dismissed" IGT's second state petition for a writ of certiorari on June 25, 2003.

IGT seeks review of the Order on the ground that the Order denied IGT due process of law and equal protection of the laws in violation of the Fourteenth Amendment of the Constitution of the United States. *See infra* pp. 13-21. The Court, therefore, has jurisdiction to review the Order pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

1. FACTUAL AND PROCEDURAL BACKGROUND.

A South Carolina jury returned a $15 million verdict for Collins, a South Carolina corporation, in this contract and tort action. App. at 2. IGT timely moved for judgment notwithstanding the verdict. *Id.* After it received a one-page trial court order that was too non-specific to preserve errors for appellate review,[1] IGT did what controlling

[1] The order's reasoning made it clear that it had not ruled on every assignment of error as required by South Carolina law. For example, the trial court denied IGT's motion for a new trial, stating that it addressed all issues correctly at trial. *See* App. at 90. This reasoning demonstrates that the trial court neither considered nor ruled on the "thirteenth juror" doctrine because IGT, for obvious reasons, could not have moved at trial for a new trial on the ground that the jury's verdict

(Continued on following page)

South Carolina precedent required,[2] and what other litigants have done:[3] it filed a motion pursuant to Rule 59(e) requesting that the trial court explicitly rule on each exception and specifically state the basis for the ruling. *See id.* Collins did not object to the motion as inappropriate or successive. Instead of immediately declaring the motion improper, the trial court took the motion under consideration. More than forty-five days later, the trial court denied the motion in a one-page order. *Id.* IGT appealed within thirty days. *See id.*

IGT's appeal proceeded in the normal course until May 2002. Then, relying on precedent decided long after IGT had filed its Rule 59(e) motion, Collins moved to dismiss the appeal. Collins argued for the first time that IGT's Rule 59(e) motion had not stayed the time for filing an appeal. *See* App. at 209. A three-judge panel dismissed IGT's appeal, *see* App. at 10, and IGT moved for rehearing and rehearing *en banc*.[4] *See* App. at 24. However, the

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was so excessive as to indicate caprice, passion, or prejudice. *See* Petition for Writ of Certiorari, *IGT v. Collins*, Docket No. 03-143 (U.S. S. Ct. filed July 22, 2003).

[2] *See, e.g., Walker v. Bluffs Apartments*, 477 S.E.2d 472, 474 (S.C. Ct. App. 1996) (issue not preserved where summary judgment order did not explicitly rule on common knowledge exception argued by plaintiff); *see also infra* pp. 14 n.13 & 18.

[3] *See, e.g., Wooten v. South Carolina Dep't of Transp.*, 511 S.E.2d 355 (S.C. 1999); *see also* App. at 166-98.

[4] IGT's petition for rehearing raised federal questions. IGT argued that the Court of Appeals' holding, which tied "the tolling provisions of Rules 203(b)(1) and 59(f) to an after-the-fact determination of the 'appropriateness' of a 59(e) motion," effectively denied IGT "equal protection and due process under the Constitutions of [South Carolina] and of the United States," because the holding was "without precedent, inflict[ed] substantial injustice contrary to [South Carolina] court rules, and ignore[ed] federal court precedent." App. at 26 & 40.

three-judge panel could not act on the rehearing request because one member of the three-judge panel disqualified himself after voting to dismiss IGT's appeal. App. at 139. Likewise, the Court of Appeals could not convene a quorum to act on IGT's request for rehearing *en banc*. App. at 200. Accordingly, the Court of Appeals requested certification of the case to the South Carolina Supreme Court. *Id.* The request noted that four Court of Appeals judges were disqualified, but said nothing about the three-judge panel's inability to rule on the rehearing request. *Id.*

After certifying what the Court of Appeals characterized as significant questions of "South Carolina trial and appellate procedural law" for review, *id.*, the South Carolina Supreme Court suddenly and inexplicably issued an order reversing course. The order "regarded" *only* the "petition for rehearing *en banc*" denied and stated:

> [IGT] shall have thirty days from the date of this order to serve and file a petition for writ of certiorari pursuant to Rule 226 [South Carolina Appellate Court Rule ("SCACR")]. This will give the parties an opportunity to engage in the normal procedures employed in seeking review by this Court of a Court of Appeals decision. This is the procedure that shall be followed in the rare event this situation arises again.

App. at 13.

This deceptively simple order is confusing and nonsensical when read in conjunction with South Carolina's rules of appellate procedure. By its own terms, the order specified that IGT follow the "normal procedures employed in seeking review." The order also set a time period – thirty days – within which IGT had to file a petition for writ of certiorari "pursuant to Rule 226." However, the

South Carolina Supreme Court will only review a "final decision" of the Court of Appeals, *see* S.C. App. Ct. R. 226(a), and a "decision of the Court of Appeals is not final until the petition for rehearing has been acted on by the Court of Appeals." S.C. App. Ct. R. 226(c). These signals were mixed because the Court of Appeals had *not* acted on IGT's petition for *rehearing* and the order clearly deemed only IGT's "petition for rehearing *en banc*" denied. *See* App. at 13.

Those cross-signals resulted in IGT filing a petition for writ of certiorari (the "First State Petition") that the South Carolina Supreme Court could not grant.[5] *See* S.C. App. Ct. R. 226(a); *see also Aiken, Speir Inc. v. Henry*, 486 S.E.2d 492, 492 (S.C. 1997) (court will only grant certiorari to review final order of court of appeals). Not surprisingly, the South Carolina Supreme Court denied the First State Petition.[6] Instead of remitting the case to the trial court,

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[5] IGT grounded the First State Petition on the conflict between South Carolina decisions holding that a trial judge's implicit ruling on issues in a post-trial order does not preserve those issues for appellate review, and the Court of Appeals' holding in this case. App. at 202-26.

[6] Meanwhile, on February 24, 2003, the South Carolina Supreme Court granted the South Carolina Department of Transportation's petition for writ of certiorari (which raised the same issue) in another case (the "*Elam* case"). Yet, on April 24, 2003, the South Carolina Supreme Court refused to hold the First State Petition for a decision in the *Elam* case. Instead, the South Carolina Supreme Court denied the First State Petition. The South Carolina Supreme Court's refusal to hold the First State Petition is the subject of a petition for writ of certiorari filed with this Court on July 22, 2003. *See* Petition for Writ of Certiorari, *IGT v. Collins*, Docket No. 03-143 (U.S. S. Ct. filed July 22, 2003). That petition *does not* raise the adequate and independent state law ground issue that is addressed in the present petition, *see infra* pp. 6-13, because it seeks review of the South Carolina Supreme Court's April 24, 2003, order which itself violated IGT's equal protection rights.

(Continued on following page)

the Court of Appeals considered the petition for rehearing that IGT had filed in September 2002, and, finding "no grounds for granting" it, the court denied the "petition for rehearing."[7] App. at 11. IGT then filed a timely second petition for writ of certiorari (the "Second State Petition") with the South Carolina Supreme Court. The Second State Petition raised the federal due process and equal protection claims that are the subject of this petition.[8] *See* App. at 97-127.

2. THE SOUTH CAROLINA SUPREME COURT'S JUNE 25, 2003, ORDER "DISMISSING" THE SECOND PETITION DOES NOT PREVENT REVIEW BECAUSE IT RESTS ON AN INADEQUATE STATE PROCEDURAL GROUND.

The South Carolina Supreme Court, however, did not decide those claims. Instead, it "dismissed" them, concluding that South Carolina's appellate rules did not allow for the Second State Petition. *See* App. at 23 ("[P]etitioner does not have the right to file another petition for a writ of

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See Petition for Writ of Certiorari, *IGT v. Collins*, Docket No. 03-143 (U.S. S. Ct. filed July 22, 2003).

[7] After the South Carolina Supreme Court denied the First State Petition, IGT moved the Court of Appeals to withhold issuance of the remittitur and requested a ruling on the petition for rehearing that IGT had filed in September 2002. App. at 128-29. That petition also raised federal questions. *See* App. at 129.

[8] IGT raised its federal claims in a timely manner. *See supra* p. 3 n.4. IGT raised those claims again in its petition to the Court of Appeals to withhold the remittitur. *See supra* p. 6 n.7. The Court of Appeals' order denying IGT's petition for rehearing resolved the federal claims, stating only that the court found "no grounds for granting the petition for rehearing. Therefore, the petition for rehearing is denied." App. at 11.

certiorari."). The South Carolina Supreme Court refused to address IGT's federal claims based on a previously unannounced procedural rule – that a litigant who is directed to file a premature petition for writ of certiorari must include all of her claims in that petition. That rule, announced in "rare" circumstances, *see* App. at 13 ("This is the procedure that shall be followed in the rare event this situation arises again."), was by the court's own admission neither "firmly established," nor "regularly followed," and should not bar review of IGT's federal claims.

A state-law procedural default rule can prevent subsequent federal court review of federal questions litigated in state court. *See, e.g.*, Catherine T. Struve, *Direct and Collateral Court Review of the Adequacy of State Procedural Rules*, 103 Colum. L. Rev. 243, 250-55 (2003). To prevent review, however, a state-law procedural bar must be both independent of the federal issue and adequate to support the judgment. *See N.A.A.C.P. v. Alabama*, 357 U.S. 449, 455 (1958) ("It thus becomes our duty to ascertain . . . whether the asserted non-federal ground independently and adequately supports the judgment."); *see also Lee v. Kemna*, 534 U.S. 362, 375 (2002) ("This Court will not take up a question of federal law presented in a case 'if the decision of [the state] court rests on a state law ground that is *independent* of the federal question and *adequate* to support the judgment.' ").

A state procedural ground is independent of a federal question if it does not rest primarily on federal law. *See Harris v. Reed*, 489 U.S. 255, 260-61 (1989). A procedural bar is adequate if it is " 'firmly established and regularly followed' by the time as of which it is to be applied." *Ford v. Georgia*, 498 U.S. 411, 424 (1991); *see also Johnson v. Mississippi*, 486 U.S. 578, 587 (1988) ("[A] state procedural

ground is not 'adequate' unless the procedural rule is 'strictly or regularly followed.' "); *James v. Kentucky*, 466 U.S. 341, 348-49 (1984) (accord); *Barr v. City of Columbia*, 378 U.S. 146, 149 (1964) (accord).

A state court, therefore, generally is free to adopt procedural rules that, if not complied with, result in the default of federal claims. But, even an otherwise sensible procedural rule can be invalid when applied to a specific litigant. *See Ford,* 498 U.S. at 422-23 (noting that "imposition" of a "sensible rule" is nevertheless subject to the "standards for assessing the adequacy of [an otherwise] independent state procedural" ground). In some cases the adequacy of a state procedural rule will hinge on whether the state court exercises its power to set procedure in a timely manner. *Id.* at 423. A petitioner, in short, must, at the time of her state court procedural default, have some sort of notice or fair warning of the state procedural rule's potential impact on her case. *See Ford*, 498 U.S. at 423-24; *see also N.A.A.C.P.*, 357 U.S. at 457 ("[A] local procedural rule, although it may now appear in retrospect to form part of a consistent pattern of procedures . . . cannot avail the State here, because petitioner could not fairly be deemed to have been apprised of its existence."); *Cabrera v. Barbo*, 175 F.3d 307, 313 (3d Cir. 1999) (adequate procedural rules should "speak" in "unmistakable terms" so as to put litigants "on notice of how to present" federal claims in state courts if "failure to present them is to bar" a litigant from advancing them in a federal court).

Thus, while a petitioner's failure to comply with a previously announced, well-defined procedural rule prevents subsequent review of a federal question by this Court, a state court's application of a previously unannounced rule without fair warning does not. *See Ford*, 498 U.S. at 424 (reversing and remanding state court judgment for further proceedings because procedural rule was "unannounced at the time of petitioner's trial and consequently inadequate to serve as an independent state ground" barring review of a federal question). Applying these principles to this case, the South Carolina Supreme Court's reliance on a previously unannounced rule to IGT is inadequate to prevent review of IGT's federal due process and equal protection claims. *See id.*

IGT fairly cannot be said to have been apprised that the South Carolina Supreme Court would not consider a second petition filed within thirty days of a Court of Appeals order "finally decid[ing]" IGT's petition for rehearing when the South Carolina appellate court rules specifically provide for the filing of such a petition. A litigant can (and must) file a petition for a writ of certiorari within thirty days after the Court of Appeals *finally* acts on a petition for rehearing. S.C. App. Ct. R. 226(c). Equally important, a petition for a writ of certiorari filed before the Court of Appeals enters final decision is premature. S.C. App. Ct. R. 226(a); *Aiken*, 486 S.E.2d at 492.

The Court of Appeals also obviously had no notice of the new rule. That court did not issue remittitur on the denial of the first certiorari petition filed by IGT. App. at 23; *see* S.C. App. Ct. R. 221(a). Instead, the Court of Appeals ruled on IGT's petition for rehearing, thereby indicating to IGT that the intermediate appellate court believed it retained jurisdiction to enter a final decision.

App. at 11. The South Carolina Supreme Court also explicitly recognized that confusion reigned in its order dismissing IGT's second certiorari petition on June 25, 2003.[9] *See, e.g.*, App. at 22 (noting that Court of Appeals "further" confused matters). It was in that order that IGT learned for the first time that the South Carolina Supreme Court believed that the Court of Appeals was acting without jurisdiction to entertain the rehearing petition, a process that occurred over a period of months.

Moreover, the South Carolina Supreme Court's order of January 10, 2003, did not notify IGT how it needed to present its federal claims, but instead was a source of the confusion.[10] The three-judge panel of the Court of Appeals had not "finally decided" IGT's petition for rehearing when the South Carolina Supreme Court directed IGT to file the First State Petition. *See* App. at 205 ("[That one of the members of the three-judge panel disqualified himself was] a circumstance of which [the South Carolina Supreme Court] also was apparently unaware when it issued its Order of January 10, 2003, in which it deemed denied only the *en banc* rehearing request."). Even though the request for certification specifically indicated that IGT had filed a petition for rehearing, rehearing *en banc*, or reinstatement and certification, the South Carolina Supreme

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[9] The South Carolina Supreme Court's order vacating the Court of Appeals' decision denying IGT's petition for rehearing "cannot make the record what it is not." *Missouri v. Jenkins*, 495 U.S. 33, 49 (1990).

[10] That IGT subjectively "assumed for purposes of [the First Petition] its rehearing request" would also be deemed denied is irrelevant. *See* App. at 205. The pertinent analysis is objective – could IGT reasonably have known "how to present [its] claims in the state courts." *See Ford v. Georgia*, 498 U.S. 411, 424 (1991); *Cabrera v. Barbo*, 175 F.3d 307, 313 (3d Cir. 1999).

Court only "regarded" the petition for rehearing *en banc* "denied."[11] App. at 13. Thus, by directing IGT to "serve and file a petition for writ of certiorari *pursuant to Rule 226*" so that IGT would have "an opportunity to engage in the *normal procedures* employed in seeking review," *id.* (emphasis added), the South Carolina Supreme Court sent conflicting signals that added to, rather than clarified, the confusion.

IGT could not "serve and file a petition for writ of certiorari *pursuant to Rule 226*." The Court of Appeals' order dismissing IGT's appeal was not a final, appealable order because the Court of Appeals had not acted on the petition for rehearing and the South Carolina Supreme Court's order only addressed IGT's petition for rehearing *en banc*. *See* S.C. App. Ct. R. 226(a) & (c); *see also Aiken*, 498 S.E.2d at 492. Under the "normal" procedure established by SCACR 226, IGT would have to wait until the Court of Appeals acted on its petition for rehearing before it sought certiorari review.

But, IGT could not both wait more than thirty days for a final decision of the Court of Appeals and also comply with the South Carolina Supreme Court's direction to "file and serve" a petition for writ of certiorari within "thirty

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[11] When the Court of Appeals requested certification, it stated that IGT had filed a "petition for rehearing, rehearing *en banc*, or reinstatement and certification." App. at 199. The request for certification went on to specify that the Court of Appeals could not "convene a quorum to consider the *en banc* request." App. at 200. One must assume, therefore, that the South Carolina Supreme Court only deemed the request for rehearing *en banc* denied when, with perspicuity, it stated, "Due to the inability of the Court of Appeals to convene a quorum to entertain the petition for rehearing *en banc*, the petition is hereby regarded as denied." App. at 13.

days from the date of this order." App. at 13. IGT thus was justifiably confused and "uncertain of the status of" its "request for a rehearing by the three-judge panel," App. at 205, when it filed the First State Petition. Since the Court of Appeals had not acted on IGT's petition for rehearing, no judicial action had been taken on the federal questions that IGT had raised in its petition for rehearing. Unlike the state-law arguments, which had been addressed and rejected by the three-judge panel when it dismissed IGT's appeal, the federal questions were not ripe for certiorari review. *See Aiken*, 498 S.E.2d at 492 (denying petition for writ of certiorari seeking review of an order of the Court of Appeals reinstating appeal because decision of Court of Appeals was interlocutory, not a "final decision"); *cf. Moses v. South Carolina Highway Dep't*, 187 S.E.2d 888, 889 (S.C. 1972) ("Certiorari is appellate in nature when used for the purpose of *re-examining the action of an inferior tribunal*." (emphasis added)). IGT had no warning that the South Carolina Supreme Court would not entertain its federal claims in a second petition filed in accord with the plain language of SCACR 226(c).

As this Court has acknowledged, adherence to published procedural rules "best promotes the principles of fairness, stability, and uniformity that those rules are designed to advance." *See Missouri v. Jenkins*, 495 U.S. 33, 50 (1990). When a court deviates from those rules, it undermines the "stability and clarity of jurisdictional rules" and creates confusion. *See id.* Litigants should not suffer defaults based upon court created confusion. IGT, in sum, did not have adequate notice that it would forfeit its right to pursue its federal claims by including only the state-law arguments (the only claims upon which the Court of

Appeals had acted) in the premature First State Petition it had been ordered to file.

REASONS FOR GRANTING PETITION

This case involves the application of a well-established principle of the Court's due process jurisprudence – that the government cannot actively mislead citizens about the law – in a field where commentators have described the guidance provided by the Court as "unsatisfactory." *See* Kermit Roosevelt III, *A Little Theory is a Dangerous Thing: The Myth of Adjudicative Retroactivity*, 13 Conn. L. Rev. 1075, 1104 (1999) ("Academics show rare consensus in their estimation of the Court's performance: it is unsatisfactory."). Does case law spelling out a clearly established path for appellate review "mislead" litigants if a court subsequently and unexpectedly charts a new course? South Carolina's answer to the question – effectively a terse "no" – is at odds with the United States Court of Appeals for the Ninth Circuit's answer. *See George v. Camacho*, 119 F.3d 1393 (9th Cir. 1997). Consequently, this Court should take this case and settle an important question of federal law that involves, in the words of the Ninth Circuit, "the very integrity of [our judicial] processes." *Id.* at 1396; *see also* U.S. Sup. Ct. Rule 10(c).

1. THE COURT SHOULD GRANT THE PETITION TO DETERMINE WHETHER FEDERAL DUE PROCESS PREVENTS A STATE COURT FROM CLOSING A CLEARLY ESTABLISHED AVENUE OF JUDICIAL REVIEW WITHOUT FAIR WARNING.

When IGT moved to "alter or amend" the trial court's September 5, 2001 order, two points of South Carolina law were axiomatic. First, a timely Rule 59(e) motion to alter or amend a final, appealable trial court order stayed the time for serving a notice of appeal.[12] Second, and equally important, a prospective appellant needed to make a Rule 59(e) motion to preserve an issue for judicial review if the trial court's order either did not "explicitly" address the issue,[13] or

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[12] *See* South Carolina App. Ct. R. 203(b)(1) ("When a timely motion for judgment n.o.v. (Rule 50, SCRCP), motion to alter or amend the judgment (Rules 52 and 59, SCRCP), or a motion for a new trial (Rule 59, SCRCP) has been made, the time for appeal for all parties shall be stayed and shall run from receipt of written notice of entry of the order granting or denying such motion."); *see also* SCRCP 59(e) ("A motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order.").

[13] *See Walker*, 477 S.E.2d at 474 (concluding that implicit rulings are ineffective for error preservation purposes; refusing to address argument that putative expert witness could testify under common knowledge exception where trial court ruled that expert was not qualified, but did not explicitly rule on argument for application of the common knowledge exception); *see also Noisette v. Ismail*, 403 S.E.2d 122, 123-24 (S.C. 1991) (issue not preserved for appellate review where the trial court did not explicitly rule on the appellant's argument and the appellant made no Rule 59(e) motion to alter or amend the judgment); *Van Blarcum v. City of N. Myrtle Beach*, 523 S.E.2d 486, 490 (S.C. Ct. App. 1999) (accord).

was internally inconsistent.[14] The law on those points, simply put, was in a state of equilibrium when the South Carolina Supreme Court issued its opinion in *Quality Trailer Products Inc. v. CSL Equipment Co.*, on April 1, 2002.

That decision did not purport to alter the legal stasis. Limited to its facts, the *Quality Trailer* decision stands for the unremarkable proposition that a litigant's *second*, or successive, motion for "JNOV or new trial" does not toll the time period for serving a notice of appeal. *See Quality Trailer Prods. Inc. v. CSL Equip. Co.*, 562 S.E.2d 615, 618 n.3 (S.C. 2002) ("We do not intend to suggest that I Corp.'s *initial JNOV* and new trial motions were not proper or did not toll the time for serving the notice of appeal. . . . However, the issue is whether the time for service of notice of appeal is tolled by subsequently filing *the same motion* under a different caption." (emphasis added)). The second post-trial motion in the *Quality Trailer* case was "an exact" duplicate "of the prior motion" in that it simply sought "reversal" of the trial court's order denying the first post-trial motion. *Id.* Because the second post-trial motion was not *qualitatively or functionally* different from the first post-trial motion, it was successive and, therefore, did not stay the time for appeal. *See id.*

However, the Court of Appeals' radical and unanticipated extension of *Quality Trailer* in this case disturbed the tranquil state of South Carolina's error-preservation

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[14] *Parker v. Shecut*, 531 S.E.2d 546, 557 (S.C. Ct. App. 2000), *reversed on other grounds*, 562 S.E.2d 620 (S.C. 2002) ("When an order is internally inconsistent, that inconsistency must be raised to the trial court by way of post-trial motion before it is preserved for appellate review.").

law. Instead of focusing on the *function* of the second post-trial motion, the Court of Appeals concluded that IGT's second post-trial motion was not an "appropriate" Rule 59(e) motion because it merely repeated arguments from the first post-trial motion. *See* App. at 9. The Court of Appeals extension of *Quality Trailer* thus announced a new rule – that a putative Rule 59(e) motion seeking Rule 59(e) relief (*i.e.*, one that is *qualitatively* different from the first post-trial motion) does not toll the time for filing an appeal unless it also is *quantitatively* different from the first post-trial motion. *See id.* But, how much is enough? This wholly subjective and indeterminate test impermissibly injects uncertainty into the appellate process, allowing for arbitrary and capricious results.

Moreover, by applying this midcourse reconfiguration of South Carolina's law to IGT, effecting a jurisprudential "bait and switch" if you will, the Court of Appeals left IGT with no effective appellate remedy. Does an equilibrium-shattering decision such as this deny a litigant due process of law when it deprives a litigant of her appeal as of right? While one federal court has answered the question yes, the limited decisional guidance that the Court has provided is at best peripheral, *see Reich v. Collins*, 513 U.S. 106, 108 (1994) (Georgia's declaration that what had previously appeared to be a plain and certain post-deprivation remedy was unavailable to litigant violated due process); *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673 (1930) (due process violated when state denied taxpayer relief because taxpayer failed to pursue an administrative remedy that previously "settled" law declared did not exist), and, at worst, in the words of academic commentators, is "rife with separate opinions [that] reflect a variety of conflicting and confusing approaches." Jill E. Fisch,

Retroactivity and Legal Change: Equilibrium Approach, 110 Harv. L. Rev. 1055, 1058 (1997).

Moreover, the Court of Appeals' answer to the question – a terse "no" – given in a one-page order denying IGT's petition for rehearing, *see* App. at 11, is at odds with the Ninth Circuit's thoughtful decision in *George v. Camacho*.[15] That case involved a similar midcourse reworking of decisional law establishing the time for filing a notice of appeal. In 1992, the Ninth Circuit held that litigants in the Northern Mariana Islands were afforded "a seven-day extension for filing notices of appeal." *George*, 119 F.3d at 1395 (citing *Commonwealth of Northern Mariana Islands v. Mendiola*, 976 F.2d 475 (9th Cir. 1992)). In 1997, the Ninth Circuit reversed itself, but refused to hold that "time limits established by court decisions" could "be shortened without prior notice to litigants." *Id.* at 1397. The court reasoned:

> Applying our decision retroactively would be contrary to fundamental principles of fairness and due process of law, and would call into question the very integrity of this court's processes. Announcing a rule that allows litigants a specific period of time within which to appeal and then several years later declaring that we've changed our minds and will not recognize appeals that

[15] In a similar vein, the South Carolina Supreme Court refused to address the federal question, instead resting its decision on an inadequate state law procedural ground. *See supra* pp. 6-13, and accompanying notes.

> were filed within the proscribed period would be carrying the "gotcha" beyond all previous limits.

Id.

While the Ninth Circuit found it difficult "to imagine a more compelling circumstance" for protecting a litigant's settled expectations, *id.* at 1397, this case is that circumstance. Here, South Carolina's error preservation jurisprudence dictated that IGT file a Rule 59(e) motion if it wanted to preserve each of its 28 grounds of error for judicial review. *See Walker v. Bluffs Apartments*, 477 S.E.2d 472, 474 (S.C. Ct. App. 1996) (failed to preserve common knowledge argument where argument was presented to trial court but order granting summary judgment did not explicitly address argument); *Parker v. Shecut*, 531 S.E.2d 546, 546 (S.C. Ct. App. 2000), *reversed on other grounds*, 562 S.E.2d 620 (S.C. 2002) ("When an order is internally inconsistent, that inconsistency must be raised to the trial court by way of post-trial motion before it is preserved for appellate review."). After IGT did so, it was nevertheless found to have forfeited its right to appeal. As "[d]ue process forbids the government from actively misleading a citizen" about the law, *Sundstrom v. United States*, 419 U.S. 934, 936 (1974) (Douglas, J., dissenting from denial of certiorari); *see also Zauderer v. Office of Discipline*, 471 U.S. 626, 669 (1985) (Brennan, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("Such a potential trap for an unwary attorney [exercising his right to free speech] acting in good faith . . . works a significant due process deprivation."); *Cox v. Louisiana*, 379 U.S. 559, 570 (1965) (government cannot mislead protestors into believing they would not be fined); *Raley v. Ohio*, 360 U.S. 423, 438-39 (1959) (government cannot actively mislead witness about availability of privilege), it

goes without saying that a state should not be allowed to coerce a litigant into unknowingly waiving her statutory right to an appeal. *See George*, 119 F.3d at 1397.

2. THE COURT SHOULD GRANT THE PETITION TO DETERMINE IF AN INDETERMINATE AND SUBJECTIVE TEST FOR DECIDING WHETHER A POST-TRIAL MOTION STAYS THE TIME FOR APPEAL DEPRIVES LITIGANTS OF DUE PROCESS AND EQUAL PROTECTION OF THE LAWS, WHERE APPLICATION OF THE RULE CAN LEAD TO ARBITRARY AND RANDOM RESULTS.

Once established, avenues of appellate review "must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." *Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966). The test crafted by the Court of Appeals violates that rule. Now, a motion under Rule 59(e) for clarification or explicit resolution only stays the time for filing a notice of appeal if it quantitatively differs from the first post-trial motion. The result of this test often will turn on how the trial judge responds to the motion instead of the nature of the motion and may be definitely determined by an appellate court long after the time to appeal has lapsed.

Thus, in *Elam v. South Carolina Dep't of Transp.*, the South Carolina Supreme Court granted the South Carolina Department of Transportation's ("SCDOT") petition for a writ of certiorari on the very same issue: Did the Court of Appeals err in holding that a Rule 59(e) motion does not toll the time for appeal where the trial court's order denying the petitioner's JNOV motion could have been based on either of two independent grounds, and well-established precedent required the filing of a Rule 59(e) motion to preserve both grounds for appeal? *See*

Petition for Writ of Certiorari, *IGT v. Collins*, Docket No. 03-143 (U.S. S. Ct. filed July 22, 2003). While *Elam* and *IGT* are factually indistinguishable for error-preservation purposes,[16] they differ in one respect. The trial judge responded favorably to SCDOT's Rule 59(e) motion by issuing a more detailed ruling. *See* App. at 155-56. If this distinction is meaningful, a prospective appellant's fate will turn on nothing more than the trial court's reaction to the second post-trial motion, which will hinge upon her subjective intent in denying the first post-trial motion.

The rule puts an appellant in an untenable position. She can forego making a Rule 59(e) motion in order to pursue a timely appeal; if she chooses that course, her appeal may be timely, but she runs the risk of later being told her appellate issues were not preserved because they

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[16] IGT and SCDOT both filed motions for JNOV, new trial, and new trial nisi remittitur after the jury returned an adverse verdict. The trial court, in an oral ruling in *Elam* and a written order in *IGT*, denied the motions in both cases. *See* Petition for Writ of Certiorari, *IGT v. Collins*, Docket No. 03-143 (U.S. S. Ct. filed July 22, 2003). In both cases, the trial court's ruling did not explicitly address an argument that the unsuccessful litigant wanted to preserve for judicial review. *Id.*

In the *Elam* case, the trial court could have denied South Carolina DOT's post-trial motions either on the basis of its view of the facts (*i.e.*, because the evidence supported a finding that SCDOT received notice after it completed repairs on February 10, 1998) or its view of the law (*i.e.*, South Carolina law did not require SCDOT to receive notice after it completed repairs on February 10, 1998). App. at 174. In denying the post-trial motions, the trial court did not explicitly "rule on" both grounds. Similarly, in *IGT* the reason that the trial court gave for denying IGT's Rule 59(a) request for a new trial made it clear that the trial court had not ruled on the IGT's "thirteenth juror" argument. Because implicit rulings do not preserve errors for appellate review, both SCDOT and IGT had to move to alter or amend the judgment to preserve errors for judicial review.

were not adequately ruled upon below. Or, she can make a Rule 59(e) motion to preserve issues. However, she then risks being told that her motion was not necessary because the trial judge intended to resolve the issues earlier. In that case, her time for filing an appeal will not have been tolled, and a timely appeal will in most circumstances be impossible.

South Carolina certainly is free to adopt its own procedural rules, even misguided rules that create dilemmas. What makes the dilemma created by the rule at issue in this case constitutionally problematic is that there is a high degree of uncertainty about the key question posed by the Court of Appeals' subjective test. The results, therefore, might resemble those of a lottery. There is no way for a reasonable person to discern, with any accuracy, how the test will be applied. Consequently, an appellant cannot secure and protect her statutory right to an appeal.

A state simply cannot provide an appeal as of right and then dole that right out in a completely haphazard way that rewards only those who are lucky enough to divine with accuracy the trial court's subjective intent. The law does not have to have the precision of a mathematical formula, but its application cannot be as random as a coin toss either.

CONCLUSION

The petition should be granted so that the Court can resolve these important federal questions.

Respectfully submitted,

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INDEX TO APPENDIX

South Carolina Court of Appeals Order dismissing appeal (September 4, 2002) ..... App. 1

South Carolina Court of Appeals Order denying rehearing (May 13, 2003) ..... App. 11

South Carolina Supreme Court Order deeming Petition for rehearing en banc denied (January 10, 2003) ..... App. 13

Supreme Court of South Carolina Order denying IGT's Petition for Writ of Certiorari (April 24, 2003) ..... App. 15

Supreme Court of South Carolina Order dismissing IGT's Second Petition for Writ of Certiorari (June 25, 2003) ..... App. 17

IGT's Petition to the South Carolina Court of Appeals for Rehearing, Rehearing En Banc, and Alternatively for Reinstatement and Certification (September 19, 2002) ..... App. 24

IGT's Second Petition to the Supreme Court of South Carolina for a Writ of Certiorari (June 11, 2003) ..... App. 97

IGT's Petition to Delay and Withhold Remittitur (April 29, 2003) ..... App. 128

Quality Trailer Prods. Inc. v. CSL Equip. Co., 562 S.E.2d 615 (S.C. 2002) ..... App. 132

Correspondence from South Carolina Court of Appeals Regarding Recusal of Judge Goolsby (January 27, 2003) ..... App. 139

South Carolina DOT's Petition for a Writ of Certiorari in *Elam v. South Carolina Dep't of Transportation* (October 18, 2002) ..... App. 141

INDEX TO APPENDIX – Continued

South Carolina DOT's Reply to Return in *Elam v. South Carolina Dep't of Transportation* (November 22, 2002) ..... App. 160

South Carolina DOT's Post-Trial Motions in *Wooten v. South Carolina Dep't of Transportation* (July 10, 1995) ..... App. 166

Order Denying Post-Trial Motions in *Wooten v. South Carolina Dep't of Transportation* (August 8, 1995) ..... App. 172

South Carolina DOT's Motion for Reconsideration in *Wooten v. South Carolina Dep't of Transportation* (August 24, 1995) ..... App. 176

Order on Reconsideration in *Wooten v. South Carolina Dep't of Transportation* (October 11, 1995) ..... App. 185

South Carolina DOT's Notice Appeal in *Wooten v. South Carolina Dep't of Transportation* (November 10, 1995) ..... App. 196

South Carolina Court of Appeals request to certify appeal to the Supreme Court of South Carolina (October 23, 2002) ..... App. 199

Supreme Court of South Carolina Order certifying the appeal (November 15, 2002) ..... App. 201

IGT's Petition to the Supreme Court of South Carolina for a Writ of Certiorari (February 7, 2003) ..... App. 202

SCACR 203 ..... App. 227

SCACR 221 ..... App. 231

SCACR 226 ..... App. 232

SCRCP 59(e) ..... App. 238

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Collins Music Co., Inc., Respondent,

v.

IGT a/k/a IGT-North America, Appellant.

Appeal From Horry County
John L. Breeden, Circuit Court Judge

APPEAL DISMISSED

Ronald E. Boston, of Columbia, and R. Wayne Byrd, of Florence, for appellant.

George M. Hearn, Jr., of Conway; James B. Van Osdell and Cynthia Graham Howe, both of Myrtle Beach; James R. Gilreath, of Greenville; and Scott M. Mongillo, of Mt. Pleasant for respondent.

PER CURIAM: Collins Music Company ("Collins Music") brought suit against IGT a/k/a/ IGT-North America ("IGT") in the circuit court. A jury awarded a fifteen million dollar judgment to Collins Music. IGT appeals the trial court's denial of its motions for judgment notwithstanding the verdict ("JNOV"), new trial, and new trial *nisi remittitur*. We dismiss the appeal as untimely.

FACTS/PROCEDURAL BACKGROUND

Collins Music filed suit against IGT asserting numerous causes of action arising out of a contract dispute. The parties had previously entered into a video machine distributorship agreement. A jury found in favor of Collins Music and awarded it a judgment of fifteen million dollars in actual damages.

On August 13, 2001, IGT timely filed and served post-trial motions pursuant to Rules 50(b) and 59, SCRCP. Specifically, IGT moved for JNOV, new trial, and alternatively, new trial *nisi remittitur*. IGT delineated twenty-eight grounds as support for its request for relief. The circuit court judge issued a written order denying all of IGT's post-trial motions, "[a]fter carefully reviewing the matter." IGT was served with a copy of this order on September 5, 2001.

Seven days later, on September 12, 2001, IGT served a Rule 59(e) motion to alter or amend the judgment. In the motion, IGT merely restated the arguments it made in the material filed with its first post-trial motions and requested the circuit judge to "make specific rulings, and the basis therefore [sic], as to each ground raised" in the earlier motions. On October 29, 2001, the circuit judge issued a written order denying the Rule 59(e) motion and specifically stating IGT failed to raise any issue not already considered. IGT received written notice of entry of the order on November 5, 2001. IGT served its notice of appeal on November 21, 2001.

ISSUE

Did IGT's second motion toll the time for serving an appeal?

LAW/ANALYSIS

Rule 203(b)(1), SCACR provides that a notice of appeal from a judgment of the Court of Common Pleas

> shall be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment. When a timely motion for judgment n.o.v. (Rule 50, SCRCP), motion to alter or amend the judgment (Rules 52 and 59, SCRCP), or a motion for a new trial (Rule 59, SCRCP) has been made, the time for appeal for all parties shall be stayed and shall run from receipt of written notice of entry of the order granting or denying such motion.

IGT moved for relief under Rules 50(b) and 59 within ten days of the verdict, which the circuit judge denied. Following the circuit judge's denial, IGT filed and served a Rule 59(e) motion to alter or amend the judgment. The circuit judge denied this motion.

Collins Music argues this Court lacks subject matter jurisdiction because IGT's notice of appeal was not timely served. Collins Music contends IGT's Rule 59(e) motion did not toll the time for appeal because the Rule 59(e) motion was nothing but a restatement of the arguments IGT made in its initial post-trial motions.

A. Coward Hund Construction Company v. Ball Corporation

In *Coward Hund Construction Company v. Ball Corporation,* 336 S.C. 1, 518 S.E.2d 56 (Ct. App. 1999), this Court addressed successive Rule 59(e) motions and the tolling of the time for appeal.

Coward Hund sued Ball and Carolina Glass, alleging claims for negligence, breach of express and implied warranties, and breach of contract. Coward Hund additionally sought indemnification arising from allegedly defective building repairs. The defendants moved for summary judgment.

The court granted summary judgment to both defendants on all of Coward Hund's claims. Coward Hund filed a motion for reconsideration, which was denied.

Thereafter, Coward Hund filed a second motion for reconsideration "seek[ing] clarification of the issue raised before the trial court on two occasions regarding Plaintiff's indemnity claim against Defendants." *Id.* at 2, 518 S.E.2d at 57. In response, the circuit court issued a supplemental order stating: "[T]he court granted summary judgment to Defendants Carolina Glass and Ball Corp. without the court referencing any prejudice regarding Coward Hund's indemnity claims, if any." *Id.* Coward Hund served its notice of appeal within thirty days of receiving written notice of the order denying the second motion for reconsideration but more than thirty days after receiving written notice of the order denying the first motion for reconsideration.

This Court concluded:

> "The purpose of Rule 59(e), SCRCP, to alter or amend the judgment[,] is to request the trial judge to 'reconsider matters properly encompassed in a decision on the merits.'" *Arnold v. State,* 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992) (quoting *Budinich v. Becton Dickinson and Co.,* 486 U.S. 196, 200, 108 S.Ct. 1717, 100 L. Ed.2d 178 (1988)). As one authority has noted, "Once the issue has been properly raised by a Rule 59(e) motion, it appears that it is preserved and a second motion is not required if the trial court does not specifically rule on the issue so raised." James F. Flanagan, *South Carolina Civil Procedure* 475 (2d ed. 1996).

Id. at 4, 518 S.E.2d at 58.

The *Coward Hund* decision emphasized that a successive Rule 59(e), SCRCP motion, following the denial of a similar motion, did not toll the time for appeal, where the court's ruling on the first such motion did not change or alter its ruling at trial. This Court held: "[A] second motion for reconsideration is appropriate only if it challenges something that was altered from the original judgment as a result of the initial motion for reconsideration." *Id.* at 3, 518 S.E.2d at 58.

B. Quality Trailer Products v. CSL Equipment Company

Our supreme court recently addressed the issue of whether a successive motion captioned as a Rule 59(e) motion to alter or amend tolls the time for appeal in *Quality Trailer Products, Inc. v. CSL Equipment Company,* 349 S.C. 216, 562 S.E.2d 615 (2002).

Quality Trailer Products ("Quality Trailer") brought suit against CSL Equipment Company ("CSL") and I Corp. Quality Trailer sought recovery against I Corp. for breach of the former Bulk Transfers Act, promissory estoppel, and successor liability. The circuit court granted I Corp.'s motion for directed verdict on Quality Trailer's statutory claim and submitted the remaining theories to the jury. The jury awarded judgment to Quality Trailer.

I Corp. made a timely motion for JNOV and new trial. By written order filed December 21, 1999, this motion was denied. I Corp. filed a subsequent post-trial motion captioned as a motion to "Alter, Amend or Reconsider Judgment and Findings Denying Defendant's Motion for Judgment Notwithstanding the Verdict and Motion for New Trial." *Id.* at 218, 562 S.E.2d at 616. The caption of this motion indicated it was made pursuant to Rules 52, 59, and 60. In actuality, this motion was almost a duplicate of the first motion for relief. The only alterations I Corp. made to the subsequent motion were to caption the motion differently and to change the relief sought to coincide with the second motion's caption. The circuit court recognized this successive motion was virtually identical to the first post-trial motion and denied the second motion by order dated February 16, 2000. I Corp. appealed on March 17, 2000, almost three months after the circuit judge's denial of I Corp.'s first post-trial motion for relief.

In analyzing the timeliness of appeal, the court held:

> We agree with the rationale of *Coward Hund* and hold that **successive** new trial motions or motions for JNOV do not toll the time for serving notice of appeal. **The time for filing appeal is not extended by submitting the same motion under a different caption**. *See Mickle v.*

> *Blackmon,* 255 S.C. 136, 140, 177 S.E.2d 548, 549 (1970) (treating motion based on its "substance and effect" rather than how it is captioned by movant). *See also Sears v. Sears,* 85 Ill.2d 253, 52 Ill.Dec. 608, 422 N.E.2d 610 (1981) (a successive motion that was little more than a slightly lengthened redraft of the first motion was improper and did not extend the time for filing appeal); *Boughton v. McAllister,* 576 N.W.2d 94 (Iowa 1998) (a party should not be allowed to extend the time for appeal indefinitely by filing successive motions that address the same issue).

Id. at 220-21, 562 S.E.2d at 617-18 (second emphasis added) (footnote omitted).

I Corp. argued on appeal that the second post-trial motion was required to preserve issues presented but not ruled upon in the trial court's order denying the motions for JNOV and new trial. Our supreme court disagreed stating:

> The second motion did not . . . identify a single issue raised but not ruled upon – it merely recites, verbatim, the arguments made in the earlier motions. **The trial court's denial of the JNOV and new trial motions was a ruling on all issues raised, and preserved for appellate review all issues raised therein.**

Id. at 221, 562 S.E.2d at 618 (emphasis added).

C. Applicability of Coward Hund and Quality Trailer

Coward Hund and *Quality Trailer* clearly stand for the proposition that although a successive post-trial motion for relief is permissible, the subsequent motion

must seek relief on issues coming to light as a result of an order following an initial post-trial motion that **alters or amends** the judgment. The successive motion cannot be a motion to alter or amend that merely recites arguments in a previous Rule 59(e) motion, as was the case in *Coward Hund,* or the recaptioning of a previous Rule 50 or Rule 52 motion as a Rule 59(e) motion, as was done in *Quality Trailer.*

Here, IGT requested JNOV, a new trial, and alternatively, a new trial *nisi remittitur* in its first post-trial motions. IGT premised its motions upon twenty-eight separate grounds. The circuit court denied these motions. The court made no alterations or amendments to the judgment. At that point, all issues regarding JNOV, new trial, and new trial *nisi remittitur* were resolved by the circuit judge and were ripe for appellate review. The time for IGT to serve its notice of appeal began to run following its receipt of written notice of the judge's denial order. Nevertheless IGT filed a subsequent Rule 59(e) motion, seeking an order altering or amending the post-trial order to more specifically address each of the twenty-eight separate grounds.

The circuit judge, however, was not required to provide a detailed analysis respecting each of the twenty-eight grounds offered in support of JNOV, new trial, and new trial *nisi remittitur.* The requirement imposed upon the court by Rule 52(a), SCRCP to "find the facts specially and state separately its conclusions of law" is limited to cases tried without a jury or with an advisory jury and is inapplicable here. *See, e.g.,* Rule 52(a), SCRCP ("In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law . . . . Findings of fact

and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b)."); *see also Folkens v. Hunt,* 300 S.C. 251, 254, 387 S.E.2d 265, 267 (1990) ("We have . . . refused to require trial judges to explain reasons for ruling on [the request for a new trial as the thirteenth juror]."); *Bailey v. Segars,* 346 S.C. 359, 550 S.E.2d 910 (Ct. App. 2001) (stating a form order denying a motion for JNOV and new trial coupled with the transcript of the proceedings was sufficient to allow appellate review and a Rule 59(e) motion was not required to preserve issues for appeal), *cert. granted on other grounds* (Jan. 10, 2002); *Armstrong v. Union Carbide,* 308 S.C. 235, 417 S.E.2d 597 (Ct. App. 1992) (stating that while order of the circuit court did not separately list and specifically address each of the twenty-nine exceptions raised, it was clear from reviewing the order that all grounds raised below were considered).

Additionally, IGT supported its Rule 59(e) motion not with arguments based upon the circuit judge's order, but by repeating verbatim the twenty-eight grounds found in the first motion and referencing analysis found in the first motion's memorandum of law. IGT failed to identify in its Rule 59(e) motion any issue raised but not ruled upon. The circuit judge recognized the Rule 59(e) motion as a request to revisit the grounds and arguments made in the earlier motions, and denied the motion.

IGT's second post-trial motion was not an appropriate Rule 59(e) motion; instead it was simply a successive motion for JNOV and new trial. For the reasons set forth in *Coward Hund* and *Quality Trailer,* the second post-trial motion did not toll the time for serving the notice of appeal.

CONCLUSION

The circuit judge denied IGT's motions for JNOV, new trial and new trial *nisi remittitur* in his first post-trial order. Accordingly, the underlying issues giving rise to these motions were preserved and ripe for appellate review.

We rule IGT's Rule 59(e) motion was nothing but a recapitulation of the arguments raised and previously ruled upon by the circuit court and did not toll the time for serving the notice of appeal. We therefore dismiss the appeal as untimely.

APPEAL DISMISSED.

GOOLSBY, CONNOR, ANDERSON, JJ., concur.

Filed 9-4-02

The South Carolina Court of Appeals

Collins Music Co., Inc., Respondent,

v.

IGT a/k/a IGT North-America, Appellant.

The Honorable John L. Breeden
Horry County
Trial Court Case No. 1994-CP-26-03266

ORDER

Petitioner IGT moves this Court for relief following denial of a petition for writ of certiorari from the South Carolina Supreme Court.

We have considered the petition for rehearing previously filed, as requested by the petitioner. We find no grounds for granting the petition for rehearing. Therefore, the petition for rehearing is denied.

The petition for certiorari already having been denied, the Court shall send the remittitur. IT IS SO ORDERED.

/s/ Jasper M. Cureton, J.

/s/ Carol Connor, J.

/s/ Ralph King Anderson, Jr., J.

Columbia, South Carolina
May 12, 2003

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The Supreme Court of South Carolina

Collins Music Co., Inc. Respondent,

v.

IGT a/k/a IGT[-]North[ ]America, Appellant.

ORDER

This appeal is currently before the Court in the posture of a petition for rehearing *en banc* from an order issued by a panel of the Court of Appeals dismissing the appeal as untimely. The Court of Appeals was unable to convene a quorum to consider the *en banc* request because four of its judges are recused in this matter. Accordingly, it asked that the case be certified by this Court. The Court of Appeals took no action on the petition for rehearing and the case was certified to this Court by order of the Chief Justice dated November 15, 2002.

Due to the inability of the Court of Appeals to convene a quorum to entertain the petition for rehearing *en banc*, the petition is hereby regarded as denied. Appellant shall have thirty days from the date of this order to serve and file a petition for a writ of certiorari pursuant to Rule 226, SCACR. This will give the parties an opportunity to engage in the normal procedures employed in seeking review by this Court of a Court of Appeals decision. This is the procedure that shall be followed in the rare event this situation arises again.

IT IS SO ORDERED.

/s/ Jean Hoefer Toal C.J.
/s/ James E. Moore J.
/s/ John H. Waller, Jr. J.
/s/ E.C. Burnett III J.
/s/ Costa M. Pleicones J.

Columbia, South Carolina

January 10, 2003

[LOGO]

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA
29211

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DEPUTY CLERK

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April 24, 2003

James F. Flanagan, Esquire
Law Offices of Craig Davis
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Wilson S. Sheldon, Esquire
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P O Box 1473
Columbia, SC 29202

Re: Collins Music v. IGT
1994-CP-26-03266

Dear Counsel:

The Court has issued the following Order on your Petition for Writ of Certiorari in the above entitled matter:

"Petition for Writ of Certiorari Denied.

s/ James E. Moore J.
For the Court

James F. Flanagan, Esquire
R. Wayne Byrd, Esquire
Wilson S. Sheldon, Esquire
R. Heath Atkinson, Esquire
Ronald E. Boston, Esquire
Page Two
April 24, 2003

"I would grant Certiorari.

s/ Jean H. Toal C.J.

April 24, 2003."

By copy of this letter we are advising all interested parties of the action of the Court in this matter.

Very truly yours,

/s/ Daniel E. Shearouse
CLERK

DES/dmh

cc: George M. Hearn, Jr., Esquire
James B. Van Osdell, Esquire
Cynthia Graham Howe, Esquire
James R. Gilreath, Esquire
Scott Michael Mongillo, Esquire
The Honorable Jeanne J. Roberts
The Honorable Kenneth A. Richstad

The Supreme Court of South Carolina

Collins Music Company, Inc., Respondent,

v.

IGT, a/k/a IGT-North America, Petitioner.

ORDER

Respondent filed suit against petitioner asserting numerous causes of action arising out of a contract dispute. A jury awarded a $15,000,000 judgment to respondent. A panel of the Court of Appeals dismissed petitioner's appeal on the ground that it was untimely. *Collins Music Co., Inc. v. IGT a/k/a IGT-North America*, Order No. 2002-OR-405 (S.C. Ct. App. filed September 4, 2002). Thereafter, IGT filed a petition for rehearing *en banc*.[1] However, because four Court of Appeals judges were recused in the matter, the court could not convene a quorum to consider the *en banc* request. The Court of Appeals therefore asked this Court to certify the case for review. By order dated November 15, 2002, that request was granted. The petition for rehearing *en banc* was then pending before this Court. This Court issued an order dated January 10, 2003, stating, in pertinent part, the following:

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[1] In the alternative, IGT petitioned the Court of Appeals to withdraw its order, reinstate the appeal and certify the case to this Court because it involved "legal principles of major importance to the bench, bar and litigants."

> Due to the inability of the Court of Appeals to convene a quorum to entertain the petition for rehearing *en banc, the petition is hereby regarded as denied.* Appellant shall have thirty days from the date of this order to serve and file a petition for a writ of certiorari pursuant to Rule 226, SCACR. This will give the parties an opportunity to engage in the normal procedures employed in seeking review by this Court of a Court of Appeals decision. This is the procedure that shall be followed in the rare event this situation arises again.

(Emphasis added).

Thereafter, petitioner filed a petition for a writ of certiorari to the Court of Appeals. The petition was denied on April 24, 2003. The Clerk of the Court of Appeals was notified of the denial by letter of the same date. Rule 221(b), states: "If a petition for writ of certiorari is filed, the Court of Appeals shall not send the remittitur until notified that the petition has been denied." The Court of Appeals did not immediately send the remittitur upon being informed of this Court's denial of the petition for a writ of certiorari.

On April 30, 2003, petitioner filed a petition in the Court of Appeals asking the Court of Appeals to delay sending the remittitur and to assemble a quorum to rule on petitioner's petition for rehearing *en banc* filed in September 2002 and deemed denied by this Court's order of January 10, 2003. The petition stated the following:

> This Court has not ruled upon the petition for rehearing, and the Supreme Court, to which this case was certified, ruled only that Petitioner's Petition for Rehearing *en banc* was deemed denied.

> Therefore, Petitioner, IGT, has not received a ruling on its Petition as provided in SCACR 221. Until there is a ruling by this Court on IGT's Petition for a Rehearing, or alternatively, the vacation of this Court's Order dismissing the appeal and a new hearing of Respondent's motion, there is no final judgment under SCACR 226(c) for remittitur. If remittitur occurs without a ruling on IGT's outstanding Petition for Rehearing, IGT will be denied equal protection and due process under the South Carolina Appellate Court Rules and the applicable law of South Carolina, all in violation of the equal protection and due process clauses of the South Carolina Constitution and the Constitution of the United States of America, and there will not be a final and valid judgment in this state.

Respondent filed a return asserting that, pursuant to Rule 221, upon the issuance of this Court's order denying certiorari, the original order issued by the Court of Appeals became final. Respondent argued further that petitioner's assertion that it is entitled to some further ruling on its petition for rehearing is patently without merit because it received full appellate review of the Court of Appeals' decision from the highest court in this state.

The Court of Appeals issued an order stating:

> We have considered the petition for rehearing previously filed, as requested by petitioner. We find no grounds for granting the petition for rehearing. Therefore, the petition for rehearing is denied.

The remittitur was sent the following day.

On May 15, 2003, petitioner filed another petition in the Court of Appeals asking it to recall the remittitur. Petitioner argued therein that the Court of Appeals was able to assemble a quorum to rule on the petition that petitioner filed on April 29, 2003, by substituting Judge Cureton for Judge Goolsby, who was disqualified and recused from the panel following the issuance of its order of dismissal but before the petition for rehearing could be considered, and could have done so in September 2002, when the original petition for rehearing was filed. Accordingly, petitioner maintained the Court of Appeals' order dismissing the appeal became final only upon the issuance, by the reconstituted panel, of the May 12, 2003 order denying petitioner's petition for rehearing. Petitioner argued that, pursuant to Rule 226(c), the remittitur should have been held for thirty days to allow petitioner to file a petition for writ of certiorari with this Court.[2] Once again, respondent, by way of return, argued this Court had previously issued an order denying certiorari in this case and that petitioner had already received full appellate review in the matter, including the initial panel decision, an order denying rehearing, and an order from this Court denying certiorari; therefore, there was no basis

[2] Petitioner also asked the Court of Appeals to provide petitioner with (1) the reason Judge Goolsby was disqualified [and] recused from the panel quorum that issued the September 4, 2002, order dismissing petitioner's appeal, and (2) the date the reason occurred or arose. Petitioner stated it needed the information in order to make an informed evaluation and determination with respect to raising an issue in its petition for a writ of certiorari in this Court concerning the impact, if any, Judge Goolsby's disqualification and recusal had on the September 2, 2002 order and the May 12, 2003 order.

for recalling the remittitur. This petition is still pending before the Court of Appeals.

On June 11, 2003, petitioner filed another petition for a writ of certiorari in this Court. The petition contains the same issues argued in the previous petition for a writ of certiorari, along with three additional issues. Petitioner has also filed a "Motion in Aid of Petition for Writ of Certiorari" wherein petitioner moves the Court for an order recalling the remittitur issued by the Court of Appeals or, in the alternative, declaring the remittitur invalid. Petitioner moves further for an order instructing the Court of Appeals to reveal the reason for Judge Goolsby's disqualification from the panel that dismissed petitioner's appeal.

This Court, by order dated January 10, 2003, deemed petitioner's initial petition for rehearing denied. Thereafter, petitioner followed the normal procedures for filing a petition for a writ of certiorari to the Court of Appeals. On two separate occasions in the petition for a writ of certiorari, counsel for petitioner expressed concern regarding the manner in which this case would be reviewed by the Court. In the "Certificate of Counsel," counsel stated:

> Petitioner has been directed by this Court to file a petition for writ of certiorari and therefore has assumed for purposes of this Petition that its rehearing request would be similarly treated and also deemed denied by this Court. Petitioner asks the Court not to lose sight of the fact that, substantively, [p]etitioner has been provided no rehearing or review of any kind of the Court of Appeals' decision.

In Question 4, petitioner stated:

> Here, a member of IGT's three-judge panel recused himself prior to the decision becoming final. Accordingly, either the decision lacks efficacy and should be vacated, or this Court should review the decision pursuant to IGT's petition for a writ of certiorari. Otherwise, the decision will have had no substantive review by any court.

These statements indicate that petitioner was not seeking a ruling on the petition for rehearing, but a full review by this Court of the Court of Appeals' decision. The Court fully reviewed the Court of Appeals' decision pursuant to Rule 226, SCACR; therefore, petitioner received the relief it sought. Only after this Court's denial of the petition for a writ of certiorari did petitioner maintain the Court of Appeals' decision was not final and insist on a ruling by the Court of Appeals on its earlier petition for rehearing.

To further confuse matters, following the denial of the petition for a writ of certiorari, the Court of Appeals failed to immediately send the remittitur and then entertained a petition for rehearing although it had no authority to do so.[3] Rule 221(a), SCACR ("Petitions for rehearing must be actually received by the appellate court no later than fifteen (15) days after the filing of the opinion, order,

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[3] Interestingly, upon the denial of the petition for rehearing, the Court of Appeals sent the remittitur immediately instead of waiting, as required by Rule 221(b), SCACR, until the time to petition for a writ of certiorari under Rule 226(c) had expired. Petitioner has filed a petition to recall the remittitur in the Court of Appeals on that ground. The petition is still pending.

judgment, or decree of the court. . . . No petition for rehearing shall be allowed from an order denying a petition for a writ of certiorari under Rule 226, SCACR.); Rule 221(b) (the Court of Appeals shall send the remittitur upon being notified that the petition for a writ of certiorari has been denied).

This matter has been finally decided by this Court. In this Court's January 10, 2003 order, petitioner received the relief it seeks – a denial of its petition for rehearing. However, petitioner did not receive the ultimate result it sought – the issuance of a writ of certiorari. The Court of Appeals did not have the authority to resurrect the case after this Court's decision. Moreover, because the Court of Appeals did not have the authority to rule on the petition for rehearing filed after this Court's decision, petitioner does not have the right to file another petition for a writ of certiorari.

We therefore dismiss the petition for a writ of certiorari and vacate the Court of Appeals' order denying petitioner's latest petition for rehearing. We also deny the "Motion in Aid of Petition for Certiorari" since the remittitur was properly sent, albeit late, to the lower court.

IT IS SO ORDERED.

/s/ Jean Hoefer Toal C.J.
/s/ James E. Moore J.
/s/ John H. Waller, Jr. J.
/s/ E.C. Burnett III J.
/s/ Costa M. Pleicones J.

Columbia, South Carolina

June 25, 2003

THE STATE OF SOUTH CAROLINA

In The Court Of Appeals

APPEAL FROM HORRY COUNTY

Court of Common Pleas

John L. Breeden, Jr., Circuit Court Judge

Case No. 94-CP-26-3266

Collins Music Co., Inc., Respondent,

v.

IGT a/k/a IGT-North America, Appellant.

PETITION FOR REHEARING AND REHEARING *EN BANC*, AND ALTERNATIVELY FOR REINSTATEMENT, AND CERTIFICATION

Appellant, IGT a/k/a IGT-North America ("IGT"), respectfully petitions the Court, pursuant to Rules 221(a) and 219, SCACR, for a rehearing, requesting a rehearing *En Banc*, of Respondent, Collins Music Co.'s ("Collins"), Motion to Dismiss the Appeal. In the alternative, IGT petitions the Court, pursuant to Rules 221(a) and 204(b), SCACR, to withdraw its Order, to reinstate IGT's appeal, and to certify this case to the Supreme Court for review because it involves legal principles of major importance to the bench, bar and litigants.

SUMMARY OF POINTS MISAPPREHENDED OR OVERLOOKED

1. The holding at best creates substantial ambiguity in the case law governing error preservation, and at worst is inconsistent with existing error preservation

precedent from this Court and the Supreme Court. (Petition I., A.)

2. Tolling of the time to appeal is controlled by Rules 59(f), 203(b)(1), and existing case law, and is unrelated to the requirements of Rule 52(a). (Petition I., A.)

3. The qualifying language in the trial court's order clearly raised questions about the existence and sufficiency of its ruling on all grounds IGT advanced in its post-trial motions, thus warranting a 59(e) motion and application of the tolling provision. (Petition I., A. and B.)

4. The trial court's wording in the order raised reasonable doubt and uncertainty to IGT and its attorneys as to whether all issues were ruled on with sufficient explicitness to preserve error for appeal. (Petition I., B.)

5. Holding that the word "denied" in post-trial motions following a jury trial prevents application of the tolling provision for a subsequently filed 59(e) motion, virtually eliminates 59(e) motions in jury trials. (Petition I., B.)

6. The holding referred to in 4 above also opens the door for jurisdictional challenges in numerous appeals now pending in the Appellate Courts and in *all* future appeals from cases where 59(e) motions are now pending. (Petition I., B.)

7. This Court misconstrues *Quality Trailer* and misapplies its holding to the facts in this case. (Petition I., C.)

8. Tying the tolling provision of Rules 203(b)(1) and 59(f) to an after-the-fact determination of the "appropriateness" of a 59(e) motion is without precedent, imposes substantial injustice contrary to the Rule 1, SCRCP, and ignores the same federal precedent upon which our Courts have previously relied. (Petition II., A.)

9. The holding referenced in 8 above, being without precedent, inflicting substantial injustice contrary to our court rules, and ignoring federal court precedent, effectively denies IGT's right to equal protection and due process under the Constitutions of this state and of the United States.

I. THE COURT MISAPPREHENDED THE EFFECT OF THE QUALIFICATIONS CONTAINED IN THE TRIAL JUDGE'S ORDER.

This appeal presents issues of overriding importance to the South Carolina bar. This Court, by treating IGT's Rule 59(e), SCRCP motion the same as its previous motions for JNOV and new trial, misapprehended the purpose of the 59(e) motion, overlooking that IGT specifically sought rulings on all issues in order to preserve them for appeal. Moreover, the Court created confusion and a conflict in the law regarding the preservation of error and the tolling provision of Rules 203(b)(1), SCACR and 59(f), SCRCP.

A. ERROR PRESERVATION IS ABSOLUTELY REQUIRED FOR ISSUES ON APPEAL.

Case law in South Carolina is replete with admonitions from its Courts that, above all other appellate practice rules, preservation of issues for appeal is paramount. In *Kennedy v. The S.C. Retirement System*, S.C. Sup. Ct. Order dated July 23, 2001 (Shearhouse Adv. Sh. No. 27) the Supreme Court stated, "We reiterate this Court's longstanding principle of error preservation. 'Preserving issues for appellate review is a fundamental component of appellate practice. South Carolina appellate courts do not recognize the plain error rule.'" (Quoting

Hon. Jean H. Toal, et al., *Appellate Practice in South Carolina* 65 (1999)).

In dozens of cases, the Courts have refused to hear issues not properly ruled on by the trial judge. (See *I'On L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000); *Summer v. Carpenter*, 328 S.C. 36, 492 S.E.2d 55 (1997); *Pelican Bldg. Ctrs. v. Dutton*, 311 S.C. 56, 427 S.E.2d 673 (1993); *Noisette v. Ismail*, 304 S.C. 56, 403 S.E.2d 122 (1991); *Shealy v. Aiken Co.*, 341 S.C. 448, 535 S.E.2d 438 (1991); T*rivelas v. S.C. D.O.T.*, 348 S.C. 124, 558 S.E.2d 271 (Ct. App. 2001); *Vespazianni v. McAlister*, 301 S.C. 411, 415 S.E.2d 427 (Ct. App. 1992) et al).

In *Noisette*, *id.*, a case cited in over thirty-five error preservation decisions, the Supreme Court held that a trial judge must "explicitly" rule on *any* issue that a party intends to appeal. If the judge does not, a party must make a 59(e) motion requesting an explicit ruling, or the issue will not be preserved for appeal. This Court now holds that *Noisette* and the cases citing it have no applicability in jury cases, stating that Rule 52(a), SCRCP only requires specific findings of fact and law in *non*-jury cases. This Court misapprehends and overlooks the Supreme Court's explicit holding in *Noisette* that error preservation requirement is premised on case law *interpreting 59(e)*, and is totally unrelated to Rule 52(a).

Furthermore, Rule 52(a) *specifically* excludes its application to orders addressing summary judgment ("findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 . . .", Rule 52(a), SCRCP). Despite this language, the Supreme Court and this Court have repeatedly *refused to address* implicitly ruled upon issues in summary judgment motions

where a 59(e) motion was not filed. (See *Summer v. Carpenter, id.*; *Trivelas v. S.C. D.O.T., id.)* Also, in *Walker v. The Bluffs Apartments*, 324 S.C. 350, 477 S.E.2d 472 (Ct. App. 1995), one of the appellant's grounds raised to the trial judge on motion for summary judgment was the common knowledge exception to the need for expert testimony. The judge found the expert's affidavit insufficient and granted summary judgment without specifically ruling on the "common knowledge" issue. On appeal, this Court refused to hear the issue stating:

> We need not address this argument because **it is not properly before the court**. The record shows that Walker argued the common knowledge exception to Narmour's motion for summary judgment. The trial court ruled that Walker's expert was not qualified, but **did not explicitly rule** on Walker's argument for application of the common knowledge exception.

By failing to even *mention* Rule 52(a) in *Walker*, this Court clearly recognizes that the "explicit" ruling requirement in case law interpreting Rule 59(e) is entirely unrelated to and independent of Rule 52(a) requirements.

Even more applicable to the particular situation here is *Payton v. Kearse*, 319 S.C. 188, 460 S.E.2d 233 (Ct. App. 1995) (rev. on other grounds), a **jury trial**, where this Court refused to hear an issue not properly addressed by the trial court, and not preserved by a 59(e) motion. This Court held that although the issue on appeal (new trial based upon juror disqualification) was *clearly* raised to the trial judge, and the judge *clearly* denied the relief sought (new trial), the *issue* was not preserved because the order failed to specifically address it, and no 59(e) motion was made. As with the above cited cases, this holding is totally

independent of Rule 52(a) and is based *only* on case law interpreting Rule 59(e) (citing *Noisette*, *id.*).

Of the cases IGT *had* for guidance, every single one held that unclear or inexplicit rulings of the trial court not preserved for review would not be considered.[1] Under these cases, IGT's motion was properly made.

B. THE TRIAL JUDGE'S ORDER REASONABLY RAISED DOUBTS AS TO WHETHER ALL ISSUES HAD BEEN PROPERLY RULED ON.

In the decision dismissing IGT's appeal, this Court determined that the trial judge's order definitively denied IGT's JNOV/new trial motions by using the word "denied;" however, the Court misapprehends and overlooks the doubt and uncertainty raised by the wording in the rest of the order. The Court's decision here leads members of the bar to believe that the word "denied" appearing in an order is now sufficient to preserve all error. Presumably, the word "granted" would have like impact. This holding at best creates a substantial ambiguity in the case law on error preservation. At worst, the holding is inconsistent with existing case law and requires those cases to be overruled. The holding also opens the door for jurisdictional challenges to appeals now pending in this Court and

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[1] Although *Coward Hund Const. Co. v. Ball Corp.*, 336 S.C. 1, 518 S.E.2d 56 (Ct. App. 1999), was decided two years prior to this trial, it held only that successive 59(e) motions do not toll the time for appeal. As IGT's first motion was clearly not a 59(e) motion, the second motion could not have been a "successive" 59(e) motion; thus *Coward Hund* has no applicability here.

the Supreme Court, as well as to currently pending 59(e) motions in jury trials.

IGT's motions for JNOV, new trial, and new trial *nisi additur* were supported by a seventeen-page memorandum of law discussing twenty-eight separate *issues* for the trial judge to consider. (Exhibits "A" and "B"). In response, the trial judge issued a one-page order, drafted by attorneys for Collins, which did not simply deny all motions; rather, it contained several qualifications casting doubt as to whether the judge had ruled on all issues. (Exhibit "C"). Again, the cases IGT had for guidence [sic] held that unclear and inexplicit rulings not preserved would not be considered.

For instance, IGT moved for new trial based upon the thirteenth juror doctrine in grounds 25 and 26 of its JNOV/new trial motion. In his order, the judge denied the new trial motions because, "all issues [were] properly addressed at trial." As the motion based on the thirteenth juror doctrine was made *after* trial, the judge's wording obviously exhibits that he had not considered that issue, or *at least* questions whether he had. IGT's subsequent 59(e) motion asked the judge to "specifically rule" on the issues and grounds raised in the JNOV/new trial motion, *which included* the thirteenth juror grounds.

Similarly, IGT's motion for JNOV included a request (ground 20) for the judge to rule "as a matter of law that Collins' claimed damages were barred by public policy." In the order, the judge denied IGT's JNOV motions because there was "sufficient evidence to sustain the jury's verdict." This made no sense, and IGT certainly could not conclude that the judge had ruled, much less sufficiently ruled, on this important legal issue. IGT requested a

specific *ruling* on this issue as well by including it as one of the twenty-eight grounds listed in its 59(e) motion.[2] (Exhibit "D").

At trial and in its initial post-trial motion for JNOV, IGT also raised several issues of law which required a ruling solely by the *judge*. They were not issues for the jury's consideration.[3] The wording of the order denying the JNOV motion clearly altered the judge's stated "legal" basis for his rulings at trial to a "sufficiency of evidence" basis in the order.[4] In addition to requesting a *ruling* on the issues and grounds, IGT's motion also asked the judge to "state the basis" for each of those grounds. Without making this request, IGT risked having these crucial issues not preserved for review by this Court.[5]

The trial judge did not simply deny IGT's motions as the Court holds. Rather, he qualified his denial. The effect of these qualifications made it unclear to IGT whether the judge ruled on all issues and whether he changed the basis

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[2] The order also failed to even mention the motions based upon IGT's counterclaims, to which at least twenty of the twenty-eight grounds pertained.

[3] See grounds 24, 28, 16, 15, 18, and 14 for JNOV.

[4] For example, IGT moved to bar Collins' damages under collateral estoppel because Collins had pled and recovered the same damages in a previous action (ground 16). The judge denied this motion on a legal basis, holding that collateral estoppel did not apply because IGT was not a party to the previous action. However, in the order, the judge stated that JNOV was denied because there was "sufficient evidence to sustain the jury's verdict."

[5] The fact that IGT's 59(e) motion included some of the 28 grounds that might *have* been ruled on is only surplusage. Their inclusion does not affect the significance of grounds included which clearly had *not* been addressed.

for his rulings from those at trial. To preserve error, IGT filed a 59(e) motion asking the judge to make "specific *rulings* and the basis therefore [sic]" as to each of the twenty-eight grounds raised in IGT's JNOV/new trial motion. This request was made *solely* for error preservation, and was consistent with the existing admonitions of this Court and the Supreme Court.

C. *QUALITY TRAILER* IS NOT APPLICABLE TO THIS CASE.

Quality Trailer holds *only* that successive motions for new trial or JNOV do not toll the time for filing a notice of appeal. Therefore, it is only applicable to this case if IGT's *second* motion was also a JNOV/new trial motion. This Court held that IGT's second post-trial motion *was*, like the second post-trial motion in *Quality Trailer*, a "successive motion for JNOV and new trial." However, in making this analogy, the Court overlooked that the Supreme Court characterized the second motion in *Quality Trailer* by the ***relief*** it sought, while this Court characterized IGT's second motion only by the ***grounds*** *supporting* the relief. A contrast of the relief sought in *both* motions reveals that IGT's 59(e) was not a successive JNOV/new trial motion.

1. *Quality Trailer* requested the identical relief in both post-trial motions.

A motion, however styled, is "to be [construed as] the type proper for the *relief* requested." *Demeres v. Roncor, Inc.*, 1992 U.S. App. LEXIS 14984 (9th Cir. 1992). (emphasis added.) Our Supreme Court has also recognized that a motion is properly construed based upon its "substance

and effect." *Mickle v. Blackmon*, 255 S.C. 136, 177 S.E.2d 548 (1970).

In *Quality Trailer*, contrary to appellant I. Corp.'s claim on appeal that its 59(e) motion was made for error preservation, the Supreme Court noted that the relief sought by I. Corp. in its second post-trial motion was exactly the *same relief* sought in its first motion. The Court was correct. The motion was *not* made for error preservation, it was made to ask for JNOV/new trial for a second time. In fact, "error preservation" as the second motion's basis was only raised *after* this Court held that "reconsideration" was not a proper basis for making a 59(e) motion.[6] I. Corp.'s mistake was evident from a review of its motions. In its JNOV motion, I. Corp. asked for the following:

> . . .[I. Corp] **respectfully prays to have the jury verdict and judgment of $86,314.53 in favor of Plaintiff, set aside and to have judgment entered in accordance with I. Corp's Motion** for Directed Verdict **and in support thereof states**: . . . (emphasis added.)

In its second motion, although captioned under 59(e), I. Corp. prayed for the *exact relief* sought in its initial motion. In fact, the second motion was an almost word-for-word duplicate of the first. There, I. Corp asked:

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[6] As evidence of further confusion, this holding is not consistent with a case cited in the order dismissing IGT's appeal, *Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992). There, the Supreme Court held, "**the purpose** of Rule 59(e), SCRCP, to alter or amend the judgment, is to request the trial judge **to reconsider** matters properly encompassed in a decision on the merits." (emphasis added).

> . . . [I.Corp] **respectfully prays to have the jury verdict and judgment of $86,314.53 in favor of Plaintiff, set aside and to have judgment entered in accordance with I. Corp's Motion** for Judgment Notwithstanding the Verdict and with I. Corp's Motion for Directed Verdict or in the alternative prays for a new trial in accordance with I. Corp's Motion for New trial **and in support thereof states**: . . . (emphasis added.)

2. IGT's second motion was not identical to its first motion

In contrast to I. Corp., IGT did not seek the same relief twice. IGT's initial post-trial motion for JNOV, new trial, and new trial *nisi remittitur*, requested the following *relief*:

> . . . IGT hereby moves the Court . . . for an Order granting IGT: (a) a judgment in favor of IGT notwithstanding the verdict [for Collins' causes of action] . . . (b) in the alternative a new trial absolute or remittitur to all causes of action of Collins, (c) a judgment in favor of IGT notwithstanding the verdict [on IGT's counterclaims] . . . (d) in the alternative, for a new trial absolute with regard to all of the causes of action set forth in IGT's Counterclaims.

Unlike *Quality Trailer*, the relief sought in IGT's JNOV/new [trial] motion is entirely different than the relief sought in its 59(e) motion. In its 59(e) motion, IGT requested the following:

> The Defendant requests that the Court make *specific rulings*, and the basis therefore [sic], as to each ground raised in Defendant's Motion for

> Judgment Notwithstanding the Verdict, New Trial and New Trial Remittitur filed August 13, 2001 with the Clerk of Court for Horry County. (emphasis added).

While nearly *every word* of I. Corp's requests in its motions for JNOV and 59(e) were identical, *not one word* of IGT's requests in its initial motions mirrored its 59(e) motion. Clearly, the motions filed by IGT were not even similar, much less identical, to the corresponding motions in *Quality Trailer*. In addition, this Court's observation that IGT filed a 59(e) motion asking the judge "to more specifically address each of the twenty-eight separate grounds" is not accurate. IGT only asked the judge to "make specific *rulings* and the *basis*" for its ruling, "as to each ground." In other words, IGT only asked the judge to *rule* on the issues, not to rehash previous rulings. Therefore, IGT's second motion was not a successive motion for JNOV and new trial, and *Quality Trailer* has no application here.[7]

II. THE COURT'S ORDER CREATES AN IMPROPER STANDARD FOR THE TOLLING PROVISION OF RULE 203(b)(1).

The last sentence of Rule 1, SCRCP, states that the rules are to be construed to achieve just determinations. This statement is consistent with [ ] Rule 8(f), which provides that pleadings should be construed to "do substantial justice." In fashioning a decision that, for the first

[7] Furthermore, it is important to note that the events surrounding IGT's 59(e) motion occurred six months *before Quality Trailer* was even decided.

time, ties the effect of the tolling provision in Rule 203(b)(1) to an after-the-fact determination of the "appropriateness" of a Rule 59(e) motion, this Court has not adhered to these principles. Rather, the Court's holding imposes a substantial *injustice* not only to IGT, but to numerous other litigants who currently have jury verdicts on appeal or pending post-trial motions. There is no precedent in South Carolina for this interpretation. Moreover, it may open the floodgate for challenges to pending and final appeals in this Court, as well as pending appeals in the Supreme Court, on the ground that the Courts lack subject matter jurisdiction.

A. FEDERAL PRECEDENT IS TOTALLY CONTRARY TO THIS DECISION.

The holdings in *Coward Hund* and *Quality Trailer* are limited to situations where a party files successive JNOV or 59(e) motions. In adopting these holdings, the Court in *Coward Hund* looked solely to federal precedent. (citing *Brown v. United Ins. Co. of Am.*, 807 F.2d 1239 (5th Cir. 1987)). Likewise, in reviewing the standard for "proper" motions for tolling purposes only, this Court should also consider federal precedent.

For purposes of tolling the time for appeal, federal courts view motions which even *arguably* could be 59(e) motions as proper. In *Forrest v. Occidental Petroleum Corp.*, 1990 U.S. App. LEXIS 19292 (9th Cir.), the court stated, "We have previously liberally interpreted motions for reconsideration as having been filed pursuant to Rule 59(e) in determining whether the time for filing a notice of appeal from the underlying judgment or order has run . . . 'Even if a motion [to alter or amend] is inartfully drawn or so defective that it could not properly be granted, **it is still**

enough to toll the time for appeal.' (quoting *Sierra-On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415 (9th Cir. 1984). (emphasis added.)

Instead of summarily dismissing a party's appeal because it does not view the 59(e) motion as "proper" or "appropriate", federal courts interpret the standard of review for 59(e) motions separately – one standard when addressing the merits of the motion, and a less-strict standard when addressing the tolling effect of the motion. In *Forrest*, *id.*, the court stated, "In cases addressing the time for appeal, we have generally found a motion for reconsideration to be within Rule 59(e) if it requests a substantive change in the judgment, *regardless of the grounds upon which it is raised* . . . [Even if a 59(e) motion] raises no new grounds but 'simply rehashes arguments heard at trial', [it] may be made under Rule 59(e)." (quoting *Clipper Express v. Rocky Mountain Motor Tarriff*, 690 F.2d 1240 (9th Cir. 1982)). The court further explained that, "On the other hand, when reviewing the merits of an order granting or denying a 59(e) motion, we apply a stricter standard." *Forrest* at 17.

Numerous federal cases follow the same principle. In *Cloud v. Summers*, 110 F.3d 67 (9th Cir. 1997), the court held, "As we have ruled, if a motion served within ten days of judgment *could* have been brought under Rule 59(e), the motion tolls the time for appeal even if Rule 59 is not expressly invoked." (emphasis added.)

As the basis for dismissal in *Coward Hund* was federal law, this Court should look to and apply the federal courts' interpretation of 59(e) motions for tolling purposes. Federal courts recognize no judicious purpose in dismissing an appeal for filing a 59(e) motion that at least has

arguable merits. This principle should be especially applicable where every single case decided at the time a 59(e) motion was filed held that such motions are not only good practice, but are *required* to preserve issues for appeal.

B. A MOTION TO ALTER OR AMEND, EVEN IF SUBSEQUENTLY DETERMINED TO BE UNNECESSARY, IS STILL A 59(e) MOTION.

As addressed above, IGT had a reasonable basis to question the sufficiency of the trial judge's order addressing IGT's JNOV and new trial motions. After reviewing the existing error preservation case law, IGT decided to file a 59(e) motion in order to unquestionably preserve its issues for appeal. In response, this Court made a hindsight substitution of its judgment for IGT's on whether a 59(e) motion was necessary and "appropriate." Furthermore, the Court held that because a 59(e) motion was not appropriate, it did not toll the time for appeal. This holding is incorrect, unfair, and should be reconsidered.

Although this Court apparently disagrees with IGT's decision that the qualifications in the order necessitated a 59(e) motion, that disagreement cannot transform the motion into a JNOV, new trial, or any other motion under the rules. Rather, the disagreement simply makes the motion a 59(e) that should be denied. Made entirely for error preservation, IGT's 59(e) motion asked the trial judge to "specifically *rule*" on the issues previously presented. This is a proper basis for filing a 59(e) motion.

CONCLUSION

The primary issue raised by the Court's opinion here is error preservation when members of the bar and litigants are faced with debatably absent, inexplicit, or unclear rulings of the trial court. IGT faced such an order concerning its initial post-trial motions. In addressing the order, this Court misapprehended, overlooked, and failed to consider the doubt raised by the trial judge's qualified denials of IGT's issues. Instead, the Court made a quantum leap to the conclusion that IGT's second post-trial motion was analogous to the corresponding motion in *Quality Trailer*. This analogy is incorrect when the relief sought in the two motions is actually contrasted.

Secondly, the Court's opinion creates a new legal standard for determining the application of the tolling provision of Rule 203(b)(1). This Court actually conditions, for the first time, the tolling provision on the subsequently determined "appropriateness" of a 59(e) motion. In light of the numerous cases where the Courts have declined to review issues because they were not preserved by a 59(e) motion, this holding places members of the bar in a literal "catch-22" when faced with a questionably unclear post-trial ruling.[8] If a 59(e) motion is not filed because in the attorney's judgment it is not necessary for error preservation, this Court may disagree and refuse to consider the issues. Conversely, if, heeding the Courts' previous error preservation admonitions, the motion *is* filed, this Court

[8] Judge Anderson recognized this predicament at the hearing when he asked, "Do you think that the law now is in a state where a trial lawyer is presented with the so-called, Catch-22?"

may now subsequently disagree with the attorney's judgment and hold the time for appeal is not tolled. Under either scenario, attorneys and litigants are now faced with abject confusion in how to protect a client's interest in this very common situation.[9]

The Court's holding in this case is a drastic and severe departure from any prior precedent or any rule of court in South Carolina. In fact, it is in opposite juxtaposition to the core principle of the rules: to achieve substantial justice. Dismissing the appeal of a fifteen million dollar judgment against IGT simply because this Court disagrees with the good-faith determination by IGT and its attorneys that the trial judge's lack of explicitness necessitated filing a 59(e) motion does not achieve justice. In fact, this decision tying the tolling provision of Rules 203(b)(1) and 59(f) to this Court's hindsight determination of the appropriateness of IGT's 59(e) motion, being without precedent, substantially unjust, and ignoring previously relied on federal precedent, effectively denies IGT the right to equal protection and due process under law.

In light of these reasons and the unaddressed questions raised by the qualifications in the trial judge's order, IGT respectfully asks this Court to reconsider its order granting Collins' motion to dismiss. Alternatively, IGT asks this Court to vacate its order and certify these important

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[9] This sentiment was recognized by Judge Goolsby. He stated, "There's some reason for confusion out there because this is not the first one of these type of cases that we've seen."

issues to the Supreme Court so that it may take and decide the issues on a clean slate.

September 19, 2002

Respectfully submitted,

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ATTORNEYS FOR APPELLANT,
IGT

EXHIBIT A

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	DOCKET NO: 94-CP-26-3266
Collins Music Co., Inc., Plaintiff,	**MOTIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT, NEW TRIAL AND NEW TRIAL REMITTITUR AND MEMORANDUM IN SUPPORT**
vs.	
IGT a/k/a IGT-North America, Defendant.	

With regard to the plaintiff's claims to breach of contract and breach of contract accompanied by fraudulent acts, the defendant IGT hereby moves this Court for any entry of judgment for the defendant IGT notwithstanding the jury verdict rendered in this Court on 2 August 2001, SCRCP 50(b). The defendant IGT also moves this Court for a new trial absolute, or in the alternative for a new trial remittitur with regard to plaintiff's causes of action. Defendant IGT also moves this court for a new trial with regard to all of its counterclaims. SCRCP 59(a)(1).

FACTS

The dispute between the parties arises out of a contractual relationship. IGT is a manufacturer of video gaming equipment and Collins was a purchaser of that equipment. In November of 1991, the parties entered into a comprehensive written agreement. The relationship between these parties is governed by that contract.

In 1994, Collins sought specific performance of this contract, an equitable remedy, in order to avoid alleged irreparable harm – the harm alleged at the time being the inability to acquire equipment. That relief was granted by order of this Court and affirmed by the South Carolina Court of Appeals. Because of that equitable relief, Collins was entitled to continue ordering equipment from IGT and IGT was obligated to supply that equipment and not provide equipment to any other potential user in the State of South Carolina.

ARGUMENTS

1) Collins Elected Its' [sic] Remedy and Made the Law of This Case

Pursuant to Collins' request, the Distributorship Agreement between the parties was effectively extended by injunctive orders of this court from 18 November 1994 until 23 November 1998. As the Court of Appeals noted, this prevented IGT from selling its products to anyone but Collins and continued Collins' contractual rights to acquire IGT products pursuant to the Distributorship Agreement. Thus, Collins' claim of damages for breach of the renewal contingency in the sales order cannot exist; it is barred by the law of *this* case! *Charleston Lumber v. Miller*, 338 S.C. 171, 525 S.E.2d 869 (2000) ("It is well-settled . . . a decision of the Court on a former appeal is the law of the case."). Having specifically asked for and received the equitable relief of specific performance for an alleged breach of contract, Collins is prohibited, as a matter of law, from recovering general damages as a result of the

same breach. *White v. Felkel*, 225 S.C. 453, 82 S.E.2d 813 (1954) (holding that plaintiff could recover special damages[1] following specific performance but *could not* recover general damages for breach). Erroneously, this law of the case was not applied or charged to the jury.[2]

2) Judicial Renewal of Agreement Avoided Collins' Claimed Damages for Non-Renewal

In addition to Collins' damages being prohibited as a matter of law, the granting of Collins' request for specific performance prevented the alleged irreparable harm from ever occurring. Specifically, Collins could not be and was not ever harmed by an inability to purchase IGT equipment because the court ordered IGT to provide machines to Collins. After getting the Court to issue such an order, however, Collins never ordered another machine from IGT.[3]

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[1] Special damages are, of course, those consistent, with the provision of equitable relief and which do not unjustly enrich a claimant. The damages presented by Collins to the jury are not special damages. Likewise, Collins would not be barred from asserting claims of breach for subsequent non-compliance with the Distributorship Agreement. This is not, however, the nature of any of Collins' claims.

[2] IGT's request to charge number. The record will also reflect that IGT counsel even requested a modified version, but it was not charged.

[3] While Collins may now assert that this was because machines were somehow defective, it did not stop Collins from promoting its exclusive relationship with IGT in subsequent documents relating to its' [sic] initial public offering of stock and proposals to Young's Food Stores. And while Collins may now assert that IGT would not sell machines to it, it never sought any contempt citations pursuant to this court's renewal of the distributorship.

3) The Integrated Distributorship Agreement Imposed No Duty to Replicate Pot-[O]-Gold Machines

The parties' written agreement provides in part: "All other . . . agreements or understandings between the parties are herewith fully terminated, it being the intention of the parties that this agreement shall be the *sole* distributorship agreement between the parties." (emphasis added). In further integration of the arrangement between the parties, the agreement provided "All orders for IGT products shall be *in writing on forms provided by IGT* . . . No order . . . shall be binding upon IGT until . . . formally accepted *in writing* . . . " (emphasis added). A standard IGT product is defined by the agreement as "that item which has, prior to the time of customer order, been designed and released to production by IGT and designated as available for sale in the territory. Anything different . . . is a custom alteration." In response to this clear and unambiguous contract language, Collins submitted *no* evidence that the agreement required IGT to produce a Pot-O-Gold replica.

Just as a party to a contract cannot be defrauded by contractual terms he did not bother to read, *Burwell v. SCN*, 288 S[.]C[.] 34, 340 S[.]E[.]2d 786 (1986), Collins cannot impose a contractual obligation to provide a custom product (i.e., a Pot-[O]-Gold replica) when the product to be bought and sold is clearly defined by the contract.[4] Moreover, the

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[4] A duty is owed by every contracting party to the other party and the public "to learn and know the contents of a written contract before he signs and delivers it." *J.B. Bolt Company v. Britt*, 129 S.C. 226, 123 S.E. 845 (1924).

evidence in this record shows a course of dealing between these two merchants which corroborates Collins knowledge of and familiarity with the standard IGT product. Notwithstanding that Collins' "wish list" might include new or different products, Collins' claim is for breach of an *actual* contract, not denial of a non-obligatory "wish list". Therefore, as a matter of law, Collins could not recover damages resulting from the alleged breach of a duty that never existed.

4) No Proof of Breach of IGT's Limited Warranty

Because the parties written agreement expressly included an exclusion of any warranty of merchantability and fitness for purpose,[5] Collins' defective product claims are, as a matter of law, limited to any claim that equipment as delivered did not operate as designed[6] – not as dreamed about. And there is *no evidence* in this record that any IGT equipment did not operate as designed.

5) The Court's Erroneous Charges on UCC Provisions Denied IGT a Fair Trial

Plaintiff's charge request numbered 3, 10, 18, 19 and 21 invited the jury to consider provisions of the Uniform

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[5] Specifically, section G of the agreement provided, in part: "THE WARRANTY STATED IN THIS PARAGRAPH IS EXCLUSIVE AND IS IN LIEU OF ALL OTHER WARRANTIES, WRITTEN OR ORAL, STATUTORY, EXPRESS, OR IMPLIED, INCLUDING ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR PURPOSE."

[6] *Accord Hill v. BASF Wyandotte*, 696 F.2d 287 (4th Cir. 1982) (holding that salesman's alleged comments could not vary terms of written warranty under the UCC).

Commercial Code as if there were no controlling agreement between the parties. Not only was there a written contract, it was an integrated, non-ambiguous contract. A charge allowing the jury to determine contract terms (plaintiff's #3) when the terms are fully set out in the written agreement is error. Likewise a charge inviting the jury to consider an offer and an acceptance (plaintiff's #10) when the contract expressly provides the method and manner for placing orders is error. The Distributorship Agreement expressly excludes warranties of the Uniform Commercial Code and expressly provides a ten day window to assert a claim under the manufacturer's limited warranty;[7] thus, it was error to charge the jury (plaintiff's #18) that plaintiff had a "reasonable time" to give general notice of a breach. Likewise, the remedy of the limited warranty precludes application of more general code remedies and it was error to charge those remedies (plaintiff's requests #19 and #21).

6) No Proof of A Distinct Fraudulent Act by IGT

While the basis for their damage finding is not specified, the jury in this case did return a verdict for Collins on its claim of Breach of Contract Accompanied by Fraudulent Act. This cause of action has three elements: (1) breach of contract; (2) that the breach was accomplished with a fraudulent intention; and (3) that the breach was accompanied by a fraudulent act. *Harper v. Ethridge*, 290

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[7] Again, section G of the agreement provides, in part: "Distributor shall have ten (10) working days from date of delivery within which to notify IGT of fault at the time of delivery, and, upon IGT request, shall provide each defective component to IGT.".

S.C. 112, 348 S.E.2d 374 (Ct. App. 1986). The law is clear that mere violation of a contract, even if willful and with fraudulent purpose, is not sufficient to make out a claim for breach of contract accompanied by fraudulent act. *Bacot v. Summit Telecommunications, Inc.*, Unpublished Opinion 98-UP-332 (June 25, 1998) (*citing inter alia*, *Smith v. Canal Ins. Co.*, 275 S.C. 256, 269 S.E.2d 348 (1980); *Floyd v. Country Squire Homes, Inc.*, 287 S.C. 51, 336 S.E.2d 520 (Ct. App. 1985).

The only acts alleged to be fraudulent in Collins' complaint (paragraph 28) are part of the acts alleged to constitute the breach (paragraph 18 of the complaint): the alleged failure to provide the latest technology and the delivery of "defective" machines (the only "defect" also being the alleged technology deficiency). Even if IGT intended to breach the parties contract, which it did not, this intent to breach does not establish a separate fraudulent act – one apart from the breach as the law requires. The verdict for breach of contract accompanied by fraudulent act is wholly unsupported by the record in this case. Indeed, the jury's failure to award any punitive damages for this cause of action despite their finding for Collins would seem to corroborate the absence of evidentiary support in the record. Thus, this Court should grant IGT judgment as to this cause of action as a matter of law notwithstanding the jury's verdict in the matter.

7) Collins Claimed Damages are Barred by Judicial Estoppel

By its counterclaim, IGT asserted causes of action for breach of contract, breach of contract accompanied by fraudulent act, fraud, and violation of the South Carolina

Unfair Trade Practices Act. Of critical evidentiary importance to each of these theories is the activity of Collins in placing non-IGT equipment in its route locations – arguably in violation of the Distributorship Agreement. In defense of this practice, Collins was allowed to assert that its route operations involved the lease of *spaces* and not machines, thereby avoiding the contractual restrictions of the distributorship. Similarly, Collins asserted that the Distributorship Agreement, by its terms, did not apply to route operations.

In total contrast to these defensive positions, however, Collins' expert, Dr. Woodside, testified as to damages to both sales *and* route operations as if the contract *did apply* to route operations. Collins cannot have it both ways![8] The doctrine of judicial estoppel prohibits a party that has assumed a particular position in a judicial proceeding from adopting an inconsistent posture in subsequent proceedings. *See e.g.*, *Hayne Federal Credit Union v. Bailey*, 327 S.C. 242, 489 S.E.2d 472 (1997).

In *Hayne*, the South Carolina Supreme Court recognized the real purpose of judicial estoppel – to preserve the integrity of the judicial process by preventing manipulation. The Court said,

> In order for the judicial process to function properly, litigants much [sic] approach it in a truthful manner. Although parties may vigorously assert

[8] Or as Judge Anderson puts it, "a litigant cannot 'blow both hot and cold'." *Quinn v. Quinn*, 343 S.C. 411, 540 S.E.2d 474 (Ct. App. 2000) (Honorable Ralph King Anderson concurring).

> their version of the facts, they may not misrepresent those facts in order to gain advantage in the process. The doctrine thus punishes those who take the truth-seeking function of the system lightly. When a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him.

327 S.C. at 251-252. To allow the jury's verdict for Collins to stand would undermine our system of justice by rewarding a deceptive litigant who plays "fast-and-loose"[9] with the courts.

The impact of Collins' manipulations on this court are unavoidable. For example, at the pre-trial summary judgement hearing, the court held that the individual machine agreements used in route operations raised issues of fact inappropriate for summary disposition. At trial, however, when IGT sought to hold Collins to its previous factual position by invoking estoppel, this court held, apparently as a matter of law, that the individual machine agreements were neither leases of space. But again, not finished with its manipulations, Collins argued to the jury that the machine agreements were leases of space – despite the court's ruling! To allow such twisting makes a mockery of our judicial system.

Accordingly, IGT moves this Court for a judgment against the plaintiff's claims notwithstanding the verdict because Collins should have been judicially estoppel [sic]

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[9] Again, Judge Anderson's choice of words, *Quinn*, but *certainly* applicable here.

from asserting those claims. In the alternative, IGT moves for a new trial on plaintiff's claims so that the doctrine of judicial estoppel can be properly applied to limit those claims. Finally, as a third alternative, IGT would move this Court for a new trial *nisi remititur* on the grounds that the damages awarded by the jury are inconsistent with the Collins' defensive position that the Distributorship Agreement does not apply to route operations; a more consistent damage award would be limited to the alleged impact on machine sales which plaintiff's expert Woodside calculated to be $2,099,629.00.

8) Collins' Claimed Breach and Damages are Barred by Judicial Admissions

At trial, Collins asserted that on March 28, 1994, there was an anticipatory breach of the sales order requiring renewal of the Distributorship Agreement. Collins was allowed to argue that its failure to consummate the product order was really the result of this alleged anticipatory breach. However, Collins' pleadings[10] are inconsistent with Collins' present position and have not been amended; specifically, these pleadings state that the product was found to be "improperly" programmed and "after discovery of the various problems with the machines delivered . . ., the plaintiff, on March 31, 1994, immediately canceled the shipment of any further machines." Again, in contrast, Collins argued at trial that an IGT breach occurred on March 28, 1994 and this resulted in the cancellation of the product order.

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[10] *See* Paragraphs 13 and 14 of Collins' Amended Complaint.

"Parties to an action are judicially concluded and bound by [either pleadings] unless withdrawn, altered or stricken by amendment or otherwise . . . **[A] party cannot subsequently take a position contradictory of, or inconsistent with, his pleadings.**" *Walton v. Wal-Mart*, (4th Cir. 1997) (emphasis added) (quoting *Elrod v. All*, 243 S.C. 425, 134 S.E.2d 410, 416 (1964)). Thus, the breach and damages now asserted by Collins should not have been allowed and judgment on plaintiff's claims should be entered for the defendant notwithstanding the verdict.

Following this Court's refusal to apply judicial admissions to bar Collins' claims, IGT sought, as an alternative, the admission (into evidence) or publication (to the jury) of Collins' pleadings. Again, this Court refused to allow the admission or publication of these pleadings as judicial admissions. Instead, the Court allowed IGT attorneys to mention the pleadings in argument – only to have that argument subsequently nullified by the court's proper instruction that attorney argument does not constitute evidence. Absent applying judicial admissions to bar Collins' claims as a matter of law, the court's failure to allow the admission or publication of these admissions denied IGT a fair trial – both as to its' defenses to Collins' claims and as to its' counterclaims. Thus, a new trial should be given.

9) Collins' Claimed Damages are Barred by Collateral Estoppel

The damages sought by Collins in this matter have been unsuccessfully sought by Collins' before against a different target; specifically, Collins' damages expert, Dr.

Perry Woodside, has testified in other forums as the result of claims brought by Collins. In those matters, Woodside has also calculated damages for the same time period – calendar years 1995, 1996 and 1997 – and for the same alleged loss – the purported inability to capture the entire South Carolina market for Pot-O-Gold type machines. In *Collins v. Leisure Time*, a jury actually returned a verdict of liability for Collins against that lone target but awarded nothing in damages – this judicial evaluation of this both liability and damages acts as a bar to any subsequent attempt to assert the same theories. The doctrine of collateral estoppel, specifically issue preclusion, now well recognized by the courts of this state, precludes a party from relitigating an issue which was decided in a previous action. *See e.g.*, *Graham v. State Farm*, 277 S.C. 389, 287 S.E.2d 495 (1982) ("the plaintiff has had his day in court and society is interested in an end of litigation.").[11]

10) Collins' Claimed Damages Were <u>Not</u> Caused by IGT

The damages described by Collins' expert Woodside again consisted of Collins' alleged inability to capture more of the market for Pot-O-Gold or Pot-O-Gold type equipment. The record before this Court demonstrates, however, that the only restrictions on Collins' ability to acquire actual Pot-O-Gold machines is his own conduct: First, in failing to meet a purchase quota and thereby

[11] Following the court's refusal to invoke the doctrine of collateral estoppel to bar Collins' claim, IGT also sought to introduce at trial of this matter the verdict form from *Collins v. Leisure Time* as well as testimonial evidence of that verdict; this evidence was not allowed.

losing his exclusive distribution status with that manufacturer;[12] and secondly, entering into an agreement with WMS which limited the percentage of machines he could buy from others.[13] Because this causation is the *only* theory supported by the record in this case, the Court should grant IGT judgment on the plaintiff's claims notwithstanding the verdict.

11) Collins' Claimed Damages are Barred by Public Policy

The damages calculated by Dr. Woodside in this case, claimed by Collins, and submitted by this Court to the jury are based upon a market evaluation of Pot-[O]-Gold machines without any regard to limitations imposed by Collins' contractual relationship with WMS.[14] The record clearly reflects,[15] however, that Collins had a minimum purchase requirement from WMS of 30% of Collins' total annual purchases. The record also reflects the number of machines purchased each year from WMS. There is no testimony that the number of WMS machines would have changed. Accordingly, Collins is contractually limited in

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[12] This status would have otherwise continued through May of 1998. It is this failure of Collins that directly and proximately allowed another, Drews, into the market – *not any conduct of IGT*.

[13] There is evidence in the record, however, that Collins did not let the WMS restriction stand in the way of purchasing Pot-[O]-Gold machines.

[14] From March 1994 through 1998, Collins was the exclusive distributor of WMS machines in South Carolina and as such had unlimited access to WMS products for both sales and routes.

[15] Indeed, corporate president and CEO Fred Collins admitted these purchase requirements.

the number of machines it could legally purchase from any other source – 70% of the total with the total number of machines calculated by dividing the number of WMS machines by 30%; these numbers are in the record for each of the relevant years.

Ignoring the restriction imposed by the WMS agreement, Dr. Woodside presented the jury with damage calculations assuming Collins had the ability to purchase Pot-O-Gold type machines from IGT in excess of the cap created by the WMS agreement – which would clearly violate the WMS agreement. Indeed the undisputed record shows that Collins did buy actual Pot-O-Gold machines up to (and exceeding) the cap imposed by his own agreement with WMS. For this Court to allow damages based upon further violation of a binding contract between the claimant and another party violates public policy.[16] Thus, this Court should grant IGT judgment notwithstanding the verdict with regard to Collins' claimed damages.

12) IGT's Claim Were Defeated By An Erroneous Failure To Apply Judicial Estoppel

By its counterclaim, IGT asserted causes of action for breach of contract, breach of contract accompanied by fraudulent act, fraud, and violation of the South Carolina Unfair Trade Practices Act. As with the defense of Collins

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[16] *Accord Bradley v. Somers*, 283 S.C. 365, 322 S.E.2d 665 (1984) (holding plaintiff may not recover damages where to allow such recovery would reward wrongdoing – in context of now abolished breach of promise to marry suit); *See Also* 17A C.J.S. Contracts §281 p. 285 ("If a plaintiff must rely on an illegal contract to establish a cause of action, he or she may not recover for damages that would otherwise be due.")

claimed damages, of critical evidentiary importance to each of these theories is the activity of Collins in placing non-IGT equipment in its route locations – arguably in violation of the Distributorship Agreement. In defense of this practice, Collins was allowed to assert that its route operations involved the lease of *spaces* and not machines, thereby avoiding the contractual restrictions of the distributorship.

IGT asserted and continued to assert that Collins should be estopped from making this space-leasing argument now as it is inconsistent with positions taken by Collins both in this case and others. Because the Court failed to apply the doctrine of judicial estoppel, Collins was allowed to take advantage of inconsistent factual positions and IGT was denied a fair trial of its damage claims. This Court should grant IGT a new trial on its counterclaims.

13) IGT's Claims Were Defeated by An Erroneous Failure to Allow Publication of Judicial Admissions

In its presentation of its counterclaim, IGT sought to demonstrate to the jury that it was in fact Collins who breached the parties' agreement by the refusing to comply with the product order placed in compliance with the terms of the Distributorship Agreement. In contrast, Collins has asserted an anticipatory breach by IGT through an alleged failure to renew; at trial, Collins suggested that its failure to comply with the product order was really the result of the alleged anticipatory breach. To rebut Collins' assertion and support its claim of breach,

IGT sought to introduce plaintiff's pleadings[17] which are inconsistent with Collins' present position. This Court refused to allow the admission or publication of these pleadings as judicial admissions. Because this erroneous failure denied IGT a fair trial on its counterclaims, a new trial on these counterclaims should be ordered.

14) Collins' Acts Have Public Impact Under the S.C.U.T.P.A.

The Court granted Collins' Motion for Directed Verdict with regard to IGT's claims under the South Carolina Unfair Trade Practices Act. This ruling was based on an erroneous application of the public impact requirement; therefore, IGT should be granted a new trial.

The public impact requirement of the Unfair Trade Practices Act does not require the potential for repetition of the exact same acts between the exact same parties, it may be satisfied when the potential exists for the targeted party to commit the same or similar acts in the marketplace – a marketplace beyond the simple relationship between two private parties.[18] Clearly that potential exists in this case! The record is replete with evidence that Collins is deeply involved in the gaming marketplace and has many similar relationships with other manufacturers.

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[17] Specifically, IGT sought to publish Paragraphs 13 and 14 of Collins' Amended Complaint.

[18] In fact, the 1996 South Carolina Supreme [Court] case of *Daisy Outdoor Advertising v. Abbott,* 322 S.C. 489, 473 S.E.2d 47, makes it clear that there is no single method of demonstrating public impact and that the Act even protects commercial members of the public from unfair and deceptive acts.

Moreover, it is difficult to imagine an industry in which the public might have greater interest or greater need to allow effective private enforcement against deceptive acts and practices. Again, even though certain aspects of video gaming are now prohibited in this state, other forms continue[19] and the record confirms Collins involvement. Finally, while it is this state's statute that IGT asserts, there is nothing that restricts the potential benefits of its application to this state. Indeed, in today's marketplace – particularly the gaming market, the harmful potential of deceptive acts and practices knows no boundry [sic]. Our legislature surely did not intend to exempt bad actors from the enforcement potential of this Act even if the potential future victims were limited to non-residents of our state.

15) Court's other Evidentiary Rulings Denied IGT Fair Trial

In addition to those evidentiary rulings previously referenced, this court refused to allow complete cross-examination of Fred Collins. Specifically, IGT sought to attack the credibility of this witness using his financial information which could convince the jury of bias;[20] despite

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[19] Indeed, as pointed out in motions before this Court, the South Carolina Supreme Court ruled as recently as last week, July 30th, that possession of video gambling equipment on marine vessels in this state was not prohibited by existing statutes and neither was operation of such equipment on day cruises outside the state's territorial waters. *Stardancer Casino, Inc. v. State,* Opinion 25335, 2001 Lexis 141 (July 30, 2001).

[20] An example of the information sought to be introduced was confirmation of Collins' corporate minutes which reflected a debt by this

(Continued on following page)

allowing financial information regarding IGT, this evidence was not allowed. Moreover, Collins was allowed to present evidence that it could not afford to pay its employees while IGT was not allowed to show the financial drain to the corporation of the witness' own salary and bonus. This evidence was not insignificant – this was the principal witness for the plaintiff corporation; moreover, to allow the jury an unbalanced picture of the relative wealth of the parties only exacerbated the harmfulness of this error.

Another example of a significant error with regard to evidence and the examination of witnesses was the court's requirement that cross-examination of Collins' expert Woodside regarding the impact of Collins separate contract with WMS be asked in hypothetical format as if the WMS contract did not exist or were unproven, when in fact, the WMS contract had previously been admitted into evidence without objection. To further compound this error, the Court instructed the jury that hypothetical questions were not evidence and should not be considered. Again, this evidence was quite harmful – this was Collins' expert on damages who offered opinions as to the alleged financial harm done to Collins by acts of IGT.

The court's rulings denied IGT a fair trial; accordingly, a new trial should be granted.

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witness to the corporation of approximately 7 million dollars. Another example would be the amount of the corporation's expense in compensating the witness in his role as corporate president.

15) Court's Other Rulings Denied IGT Fair Trial

IGT hereby incorporates any and all of its trial objections and request for rulings. The totality of the record in this case makes it clear that justice has not been done. Errors and manipulation have allowed an unbalanced and unfair presentation to the jury. This court should remedy this grave injustice by granting a new trial.

TURNER, PADGET, GRAHAM & LANEY, P.A.

By: /s/ _____

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August ___, 2001

EXHIBIT B

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	DOCKET NO: 94-CP-26-3266
Collins Music Co., Inc., Plaintiff, vs. IGT a/k/a IGT-North America, Defendant.	**MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, NEW TRIAL AND NEW TRIAL REMITTITUR**

Defendant IGT a/k/a IGT-North America (hereinafter "IGT") hereby files this Memorandum in support of its Motions for Judgment Notwithstanding the Verdict, New Trial and New Trial Remittitur.

FACTS

The dispute between the parties arises out of a contractual relationship. IGT is a manufacturer of video gaming equipment and Collins was a purchaser of that equipment. In November of 1991, the parties entered into a comprehensive written agreement. The relationship between these parties is governed by that contract.

In 1994, Collins sought specific performance of this contract, an equitable remedy, in order to avoid alleged irreparable harm – the harm alleged at the time being the inability to acquire equipment. That relief was granted by Order of this Court on November 18, 1994. Because of that equitable relief, Collins was entitled to continue ordering equipment from IGT and IGT was obligated to supply that equipment pursuant to terms set forth in the parties' 1991

Distributorship Agreement. The Court further ordered IGT not to provide equipment to any other potential user in the State of South Carolina during the term of the injunction.

ARGUMENTS

1) Collins Elected Its' [sic] Remedy and Made the Law of This Case

Pursuant to Collins' request, the Distributorship Agreement between the parties was effectively extended by injunctive order of this Court from November 18, 1994 until November 23, 1998. As the Court of Appeals noted, this prevented IGT from selling its products to anyone but Collins and continued Collins' contractual rights to acquire IGT products pursuant to the Distributorship Agreement. Thus, Collins' claim of damages for breach of the renewal contingency in the sales order cannot exist; it is barred by the law of *this* case. *Charleston Lumber v. Miller,* 338 S.C. 171, 525 S.E.2d 869 (2000) ("It is well-settled . . . a decision of the Court on a former appeal is the law of the case.").

Having specifically asked for and received the equitable relief of specific performance for an alleged breach of contract, Collins is prohibited, as a matter of law, from recovering general damages as a result of the same breach. *White v. Felkel,* 225 S.C. 453, 82 S.E.2d 813 (1954) (holding that plaintiff could recover special damages[1]

[1] Special damages are, of course, those consistent with the provision of equitable relief and which do not unjustly enrich a claimant. The damages presented by Collins to the jury are not special damages. Likewise, Collins would not be barred from asserting claims of breach for subsequent non-compliance with the Distributorship Agreement. This is not, however, the nature of any of Collins' claims.

following specific performance but *could not* recover general damages for breach). Additionally, the evidence was undisputed that Collins continued to market itself as the exclusive distributor of IGT products in South Carolina *after* November 18, 1994. This marketing was an attempt by Collins to gain an advantage with regards to potential customers and to increase the potential value of Collins' proposed Initial Public Offering. Erroneously, this law of the case was not applied or charged to the jury.[2]

2) Judicial Renewal of Agreement Avoided Collins' Claimed Damages for Non-Renewal

In addition to Collins' damages being prohibited as a matter of law, the granting of Collins' request for specific performance prevented the alleged irreparable harm from ever occurring. Specifically, Collins could not be and was not ever harmed by an inability to purchase IGT equipment because the Court ordered IGT to provide machines to Collins. However, after getting the Court to issue such an order, Collins never ordered another machine from IGT.[3]

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[2] IGT's request to charge number 25. The record will also reflect that IGT counsel even requested a modified version, but it was not charged.

[3] While Collins may now assert that this was because machines were somehow defective, it did not stop Collins from promoting its exclusive relationship with IGT in subsequent documents relating to its' [sic] initial public offering of stock and proposals to Young's Food Stores. And while Collins may now assert that IGT would not sell machines to it, it never sought any contempt citations pursuant to this Court's renewal of the distributorship. (*See Plum Creek Development Co., Inc. v. City of Conway*, 334 S.C. 30, 512 S.E.2d 106 (1999)).

3) The Integrated Distributorship Agreement Imposed No Duty to Replicate Pot-[O]-Gold Machines

The parties' written agreement provides in part: "All other . . . agreements or understandings between the parties are herewith fully terminated, it being the intention of the parties that this agreement shall be the *sole* distributorship agreement between the parties." (emphasis added). In further integration of the arrangement between the parties, the agreement provided "All orders for IGT products shall be *in writing on forms provided by IGT* . . . No order . . . shall be binding upon IGT until . . . formally accepted *in writing* . . . " (emphasis added). A standard IGT product is defined by the agreement as "that item which has, prior to the time of customer order, been designed and released to production by IGT and designated as available for sale in the territory. Anything different . . . is a custom alteration." In response to this clear and unambiguous contract language, Collins submitted *no* evidence that the agreement required IGT to produce a Pot-O-Gold replica.

Collins' damages argued and submitted to the jury for its consideration were based upon contractual duties not set forth in the Distributorship Agreement. The Court's failure to grant IGT's motion for directed verdict and/or, strike Collins' specific allegations of breach as set forth in paragraph 18 of Collins' complaint was error. Collins' damages submitted to the jury covered a time period from November of 1994 through November of 1997. In order for Collins to have suffered any contractual damages during this time period, the duties of IGT as set forth in the 1991 Distributorship Agreement would have to be rewritten and/or implied to include a duty to provide Collins with a product equivalent to a competitor's product. As a matter

of law, no such duty is found within the four corners of the 1991 Distributorship Agreement.

Just as a party to a contract cannot be defrauded by contractual terms he did not bother to read, *Burwell v. SCN,* 288 S[.]C[.] 34, 340 S[.]E[.]2d 786 (1986), Collins cannot impose a contractual obligation to provide a custom product (i.e., a Pot-[O]-Gold replica) when the product to be bought and sold is clearly defined by the contract.[4] Moreover, the evidence in this record shows a course of dealing between these two merchants which corroborates Collins knowledge of and familiarity with the standard IGT product. Notwithstanding that Collins' "wish list" might include new or different products, Collins' claim is for breach of an *actual* contract, not denial of a non-obligatory "wish list". Therefore, as a matter of law, Collins could not recover damages resulting from the alleged breach of a duty that never existed.

4) No Proof of Breach of IGT's Limited Warranty

Because the parties written agreement expressly included an exclusion of any warranty of merchantability and fitness for purpose,[5] Collins' defective product claims

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[4] A duty is owed by every contracting party to the other party and the public "to learn and know the contents of a written contract before he signs and delivers it." *J.B. Bolt Company v. Britt,* 129 S.C. 226, 123 S.E. 845 (1924).

[5] Specifically, section G of the agreement provided, in part: "THE WARRANTY STATED IN THIS PARAGRAPH IS EXCLUSIVE AND IS IN LIEU OF ALL OTHER WARRANTIES, WRITTEN OR ORAL, STATUTORY, EXPRESS, OR IMPLIED, INCLUDING ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR PURPOSE."

are, as a matter of law, limited to any claim that equipment as delivered did not operate as designed[6] – not as dreamed about. And there is *no evidence* in this record that any IGT equipment did not operate as designed.

5) The Court's Erroneous Charges on UCC Provisions Denied IGT a Fair Trial

Plaintiff's charge request numbered 3, 10, 18, 19 and 21 invited the jury to consider provisions of the Uniform Commercial Code as if there were no controlling agreement between the parties. Not only was there a written contract, it was an integrated, non-ambiguous contract. A charge allowing the jury to determine contract terms (plaintiffs #3) when the terms are fully set out in the written agreement is error. Likewise a charge inviting the jury to consider an offer and an acceptance (plaintiff's #10) when the contract expressly provides the method and manner for placing orders is error. The Distributorship Agreement expressly excludes warranties of the Uniform Commercial Code and expressly provides a ten day window to assert a claim under the manufacturer's limited warranty;[7] thus, it was error to charge the jury (plaintiff's #18) that plaintiff had a "reasonable time" to give general notice of a breach. Likewise, the remedy of the limited

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[6] *Accord Hill v. BASF Wyandotte,* 696 F.2d 287 (4th Cir. 1982) (holding that salesman's alleged comments could not vary terms of written warranty under the UCC).

[7] Again, section G of the agreement provides, in part: "Distributor shall have ten (10) working days from date of delivery within which to notify IGT of fault at the time of delivery, and, upon IGT request, shall provide each defective component to IGT.".

warranty precludes application of more general code remedies and it was error to charge those remedies (plaintiff's requests #19 and #21).

6) No Proof of A Distinct Fraudulent Act by IGT

While the basis for their damage finding is not specified, the jury in this case did return a verdict for Collins on its claim of Breach of Contract Accompanied by Fraudulent Act. This cause of action has three elements: (1) breach of contract; (2) that the breach was accomplished with a fraudulent intention; and (3) that the breach was accompanied by a fraudulent act. *Harper v. Ethridge,* 290 S.C. 112, 348 S.E.2d 374 (Ct. App. 1986). The law is clear that mere violation of a contract, even if willful and with fraudulent purpose, is not sufficient to make out a claim for breach of contract accompanied by fraudulent act. *Bacot v. Summit Telecommunications, Inc.,* Unpublished Opinion 98-UP-332 (June 25, 1998) (*citing inter alia, Smith v. Canal Ins. Co.,* 275 S.C. 256, 269 S.E.2d 348 (1980); *Floyd v. Country Squire Homes, Inc.,* 287 S.C. 51, 336 S.E.2d 520 (Ct. App. 1985).

The only acts alleged to be fraudulent in Collins' complaint (paragraph 28) are part of the acts alleged to constitute the breach (paragraph 18 of the complaint): the alleged failure to provide the latest technology and the delivery of "defective" machines (the only "defect" also being the alleged technology deficiency). Even if IGT intended to breach the parties contract, which it did not, this intent to breach does not establish a separate fraudulent act – one apart from the breach as the law requires. The verdict for breach of contract accompanied by fraudulent act is wholly unsupported by the record in this case.

Indeed, the jury's failure to award any punitive damages for this cause of action despite their finding for Collins would seem to corroborate the absence of evidentiary support in the record. T[illegible] this Court should grant IGT judgment as to this cause of action as a matter of law notwithstanding the jury's verdict in the matter.

7) Collins Claimed Breaches and Damages are Barred by Judicial Estoppel

By its counterclaim, IGT asserted causes of action for breach of contract, breach of contract accompanied by fraudulent act, fraud, and violation of the South Carolina Unfair Trade Practices Act. Of critical evidentiary importance to each of these theories is the activity of Collins in placing non-IGT equipment in its route locations – arguably in violation of the Distributorship Agreement. In defense of this practice, Collins was allowed to assert that its route operations involved the lease of *spaces* and not machines, thereby avoiding the contractual restrictions of the distributorship. Similarly, Collins asserted that the Distributorship Agreement, by its terms, did not apply to route operations.

In total contrast to these defensive positions, however, Collins' expert, Dr. Woodside, testified as to damages to both sales *and* route operations as if the contract *did apply* to route operations. Collins cannot have it both ways![8] The doctrine of judicial estoppel prohibits a party

[8] Or as Judge Anderson puts it, "a litigant cannot 'blow both hot and cold'." *Quinn v. Quinn,* 343 S.C. 411, 540 S.E.2d 474 (Ct. App. 2000) (Honorable Ralph King Anderson concurring).

that has assumed a particular position in a judicial proceeding from adopting an inconsistent posture in subsequent proceedings. *See e.g., Hayne Federal Credit Union v. Bailey,* 327 S.C. 242,489 S.E.2d 472 (1997).

On November 17, 1994, Collins moved before the Court for specific performance and injunctive relief. In so doing, Collins was required to make a prima facie showing to the Court that it would suffer irreparable harm if it lost its ability to purchase IGT video gaming machines. Collins presented testimony by way of affidavit and sworn testimony in open court that the Distributorship Agreement limited his ability to place competitor's equipment on his routes and limited the sale of competitor's equipment. By taking this factual position, Collins gained an advantage in this case and was successful in persuading the Court to grant the relief sought. Not only has Collins taken an inconsistent factual position to gain an advantage in this litigation, but Collins has also taken an inconsistent factual position with regards to the leasing of machines in other litigation in order to gain an unfair advantage. It was error for this Court not to apply the doctrine of judicial estoppel.

In *Hayne,* the South Carolina Supreme Court recognized the real purpose of judicial estoppel – to preserve the integrity of the judicial process by preventing manipulation. The Court said,

> In order for the judicial process to function properly, litigants much approach it in a truthful manner. Although parties may vigorously assert their version of the facts, they may not misrepresent those facts in order to gain advantage in the process. The doctrine thus punishes those who take the truth-seeking function of the system

> lightly. When a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him.

327 S.C. at 251-252. To allow the jury's verdict for Collins to stand would undermine our system of justice by rewarding a deceptive litigant who plays "fast-and-loose"[9] with the courts.

The impact of Collins' manipulations on this court are unavoidable. For example, at the pre-trial summary judgment hearing, the Court held that the individual machine agreements used in route operations raised issues of fact inappropriate for summary disposition. At trial, however, when IGT sought to hold Collins to its previous factual position by invoking estoppel, this Court held, apparently as a matter of law, that the individual machine agreements were neither leases of machines or space. But again, not finished with its manipulations, Collins argued to the jury that the machine agreements were leases of space – despite the Court's ruling! To allow such twisting makes a mockery of our judicial system.

Accordingly, IGT moves this Court for a judgment against the plaintiff's claims notwithstanding the verdict because Collins should have been judicially estoppe[d] from asserting those claims. In the alternative, IGT moves for a new trial on plaintiff's claims so that the doctrine of judicial estoppel can be properly applied to limit those claims. Finally, as a third alternative, IGT would move

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[9] Again, Judge Anderson's choice of words, *Quinn,* but *certainly* applicable here.

this Court for a new trial *nisi remittitur* on the grounds that the damages awarded by the jury are inconsistent with the Collins' defensive position that the Distributorship Agreement does not apply to route operations; a more consistent damage award would be limited to the alleged impact on machine sales which plaintiff's expert Woodside calculated to be $2,099,629.00.

8) Collins' Claimed Breach and Damages are Barred by Judicial Admissions

At trial, Collins asserted that on March 28, 1994, there was an anticipatory breach of the sales order requiring renewal of the Distributorship Agreement. Collins was allowed to argue that its failure to consummate the product order was really the result of this alleged anticipatory breach. However, Collins' pleadings[10] are inconsistent with Collins' present position and have not been amended; specifically, these pleadings state that the product was found to be "improperly" programmed and "after discovery of the various problems with the machines delivered . . . , the plaintiff, on March 31, 1994, immediately canceled the shipment of any further machines." Again, in contrast, Collins argued at trial that an IGT breach occurred on March 28, 1994 and this resulted in the cancellation of the product order.

"Parties to an action are judicially concluded and bound by [either pleadings] unless withdrawn, altered or stricken by amendment or otherwise . . . **[A] party cannot subsequently take a position contradictory of,**

[10] *See* Paragraphs 13 and 14 of Collins' Amended Complaint.

or inconsistent with, his pleadings." *Walton v. Wal-Mart*, (4th Cir. 1997) (emphasis added) (quoting *Elrod v. All*, 243 S.C. 425, 134 S.E.2d 410, 416 (1964)). Thus, the breach and damages now asserted by Collins should not have been allowed and judgment on plaintiff's claims should be entered for the defendant notwithstanding the verdict.

Following this Court's refusal to apply judicial admissions to bar Collins' claims, IGT sought, as an alternative, the admission (into evidence) or publication (to the jury) of Collins' pleadings. Again, this Court refused to allow the admission or publication of these pleadings as judicial admissions. Instead, the Court allowed IGT attorneys to mention the pleadings in argument – only to have that argument subsequently nullified by the court's proper instruction that attorney argument does not constitute evidence. Absent applying judicial admissions to bar Collins' claims as a matter of law, the [C]ourt's failure to allow the admission or publication of these admissions denied IGT a fair trial – both as to its' [sic] defenses to Collins' claims and as to its' [sic] counterclaims. Thus, a new trial should be given.

9) Collins' Claimed Damages are Barred by Collateral Estoppel

The damages sought by Collins in this matter have been unsuccesfully sought by Collins' before against a different target; specifically, Collins' damages expert, Dr. Perry Woodside, has testified in other forums as the result of claims brought by Collins. In those matters, Woodside has also calculated damages for the same time period – calendar years 1995, 1996 and 1997 – and for the same

alleged loss – the purported inability to capture the entire South Carolina market for Pot-O-Gold type machines. In *Collins v. Leisure Time,* a jury actually returned a verdict of liability for Collins against that lone target but awarded nothing in damages – this judicial evaluation of both liability and damages acts as a bar to any subsequent attempt to assert the same theories. The doctrine of collateral estoppel, specifically issue preclusion, now well recognized by the courts of this state, precludes a party from relitigating an issue which was decided in a previous action. *See e.g., Graham v. State Farm,* 277 S.C. 389, 287 S.E.2d 495 (1982) ("the plaintiff has had his day in court and society is interested in an end of litigation.").[11]

10) Collins' Claimed Damages Were <u>Not</u> Caused by IGT

The damages described by Collins' expert Woodside again consisted of Collins' alleged inability to capture more of the market for Pot-O-Gold or Pot-O-Gold type equipment. The record before this Court demonstrates, however, that the only restrictions on Collins' ability to acquire actual Pot-O-Gold machines is his own conduct: First, in failing to meet a purchase quota and thereby losing his exclusive distribution status with that manufacturer[12]; and

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[11] Following the [C]ourt's refusal to invoke the doctrine of collateral estoppel to bar Collins' claim, IGT also sought to introduce at trial of this matter the verdict form from *Collins v. Leisure Time* as well as testimonial evidence of that verdict; this evidence was not allowed.

[12] This status would have otherwise continued through May of 1998. It is this failure of Collins that directly and proximately allowed another, Drews, into the market – *not any conduct of IGT.*

secondly, entering into an agreement with WMS which limited the percentage of machines he could buy from others.[13] Because this causation is the *only* theory supported by the record in this case, the Court should grant IGT judgment on the plaintiff's claims notwithstanding the verdict.

11) Collins' Claimed Damages are Barred by Public Policy

The damages calculated by Dr. Woodside in this case, claimed by Collins, and submitted by this Court to the jury are based upon a market evaluation of Pot-O-Gold machines without any regard to limitations imposed by Collins' contractual relationship with WMS.[14] The record clearly reflects,[15] however, that Collins had a minimum purchase requirement from WMS of 30% of Collins' total annual purchases. The record also reflects the number of machines purchased each year from WMS. There is no testimony that the number of WMS machines would have changed. Accordingly, Collins is contractually limited in the number of machines it could legally purchase from any other source – 70% of the total with the total number of machines calculated by dividing the number of WMS

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[13] There is evidence in the record, however, that Collins did not let the WMS restriction stand in the way of purchasing Pot-[O]-Gold machines.

[14] From March 1994 through 1998, Collins was the exclusive distributor of WMS machines in South Carolina and as such had unlimited access to WMS products for both sales and routes.

[15] Indeed, corporate president and CEO Fred Collins admitted these purchase requirements.

machines by 30%; these numbers are in the record for each of the relevant years.

Ignoring the restriction imposed by the WMS agreement, Dr. Woodside presented the jury with damage calculations assuming Collins had the ability to purchase Pot-O-Gold type machines from IGT in excess of the cap created by the WMS agreement – which would clearly violate the WMS agreement. Indeed the undisputed record shows that Collins did buy actual Pot-O-Gold machines up to (and exceeding) the cap imposed by his own agreement with WMS. For this Court to allow damages based upon further violation of a binding contract between the claimant and another party violates public policy.[16] Thus, this Court should grant IGT judgment notwithstanding the verdict with regard to Collins' claimed damages.

12) IGT's Claims Were Defeated By An Erroneous Failure To Apply Judicial Estoppel

By its counterclaim, IGT asserted causes of action for breach of contract, breach of contract accompanied by fraudulent act, fraud, and violation of the South Carolina Unfair Trade Practices Act. As with the defense of Collins claimed damages, of critical evidentiary importance to each of these theories is the activity of Collins in placing non-IGT equipment in its route locations – arguably in

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[16] *Accord Bradley v. Somers,* 283 S.C. 365, 322 S.E.2d 665 (1984) (holding plaintiff may not recover damages where to allow such recovery would reward wrongdoing – in context of now abolished breach of promise to marry suit); [*s*]*ee* [*a*]*lso* 17A C.J.S. Contracts §281 p. 285 ("If a plaintiff must rely on an illegal contract to establish a cause of action, he or she may not recover for damages that would otherwise be due.")[.]

violation of the Distributorship Agreement. In defense of this practice, Collins was allowed to assert that its route operations involved the lease of *spaces* and not machines, thereby avoiding the contractual restrictions of the distributorship.

IGT asserted and continued to assert that Collins should be estopped from making this space-leasing argument now as it is inconsistent with positions taken by Collins both in this case and others. Because the Court failed to apply the doctrine of judicial estoppel, Collins was allowed to take advantage of inconsistent factual positions and IGT was denied a fair trial of its damage claims. This Court should grant IGT a new trial on its counterclaims.

13) IGT's Claims Were Defeated by An Erroneous Failure to Allow Publication of Judicial Admissions

In its presentation of its counterclaim, IGT sought to demonstrate to the jury that it was in fact Collins who breached the parties' agreement by the refusing to comply with the product order placed in compliance with the terms of the Distributorship Agreement. In contrast, Collins has asserted an anticipatory breach by IGT through an alleged failure to renew; at trial, Collins suggested that its failure to comply with the product order was really the result of the alleged anticipatory breach. To rebut Collins' assertion and support its claim of breach, IGT sought to introduce plaintiff's pleadings[17] which are

[17] Specifically, IGT sought to publish Paragraphs 13 and 14 of Collins' Amended Complaint.

inconsistent with Collins' present position. This Court refused to allow the admission or publication of these pleadings as judicial admissions. Because this erroneous failure denied IGT a fair trial on its counterclaims, a new trial on these counterclaims should be ordered.

14) Collins' Acts Have Public Impact Under the S.C.U.T.P.A.

The Court granted Collins' Motion for Directed Verdict with regard to IGT's claims under the South Carolina Unfair Trade Practices Act. This ruling was based on an erroneous application of the public impact requirement; therefore, IGT should be granted a new trial.

The public impact requirement of the Unfair Trade Practices Act does not require the potential for repetition of the exact same acts between the exact same parties, it may be satisfied when the potential exists for the targeted party to commit the same or similar acts in the marketplace – a marketplace beyond the simple relationship between two private parties.[18] Clearly that potential exists in this case! The record is replete with evidence that Collins is deeply involved in the gaming marketplace and has many similar relationships with other manufacturers.

Moreover, it is difficult to imagine an industry in which the public might have greater interest or greater

[18] In fact, the 1996 South Carolina Supreme [Court] case of *Daisy Outdoor Advertising v. Abbott,* 322 S.C. 489, 473 S.E.2d 47, makes it clear that there is no single method of demonstrating public impact and that the Act even protects commercial members of the public from unfair and deceptive acts.

need to allow effective private enforcement against deceptive acts and practices. Again, even though certain aspects of video gaming are now prohibited in this state, other forms continue[19] and the record confirms Collins involvement. Finally, while it is this state's statute that IGT asserts, there is nothing that restricts the potential benefits of its application to this state. Indeed, in today's marketplace – particularly the gaming market, the harmful potential of deceptive acts and practices knows no boundry [sic]. Our legislature surely did not intend to exempt bad actors from the enforcement potential of this Act even if the potential future victims were limited to non-residents of our state.

15) Court's [O]ther Evidentiary Rulings Denied IGT Fair Trial

In addition to those evidentiary rulings previously referenced, this [C]ourt refused to allow complete cross-examination of Fred Collins. Specifically, IGT sought to attack the credibility of this witness using his financial information which could convince the jury of bias;[20] despite

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[19] Indeed, as pointed out in motions before this Court, the South Carolina Supreme Court ruled as recently as last week, July 30th, that possession of video gambling equipment on marine vessels in this state was not prohibited by existing statutes and neither was operation of such equipment on day cruises outside the state's territorial waters. *Stardancer Casino, Inc. v. State,* Opinion 25335, 2001 Lexis 141 (July 30, 2001).

[20] An example of the information sought to be introduced was confirmation of Collins' corporate minutes which reflected a debt by this witness to the corporation of approximately 7 million dollars. Another example would be the amount of the corporation's expense in compensating the witness in his role as corporate president.

allowing financial information regarding IGT, this evidence was not allowed. Moreover, Collins was allowed to present evidence that it could not afford to pay its employees while IGT was not allowed to show the financial drain to the corporation of the witness' own salary and bonus. This evidence was not insignificant – this was the principal witness for the plaintiff corporation; moreover, to allow the jury an unbalanced picture of the relative wealth of the parties only exacerbated the harmfulness of this error.

Additionally, on July 19, 2001, Collins made a motion for summary judgment requesting that the Court rule as a matter of law that Collins' Coin Machine and Lease Agreement was a lease of space as opposed to a lease of machines. By this request, Collins sought to avoid a specific breach of the Distributorship Agreement. On July 23, 2001, this Court denied Collins' motion for summary judgment on grounds that there were genuine issues of fact yet to be determined. By way of this ruling, the purpose, meaning, and intent of the parties with regard to the Coin Machine and Lease Agreement became a factual issue for the jury's determination. This allowed Collins' counsel to present evidence and argue to the jury that the Coin Machine and Lease Agreement was nothing more than a lease of space and therefore not a breach of the Distributorship Agreement. Subsequently, the Court denied IGT's motion to apply judicial estoppel against Collins by ruling that the Coin Machine and Lease Agreement was an issue of law, *not* a matter of fact to be determined [by] the jury.

Another example of a significant error with regard to evidence and the examination of witnesses was the [C]ourt's requirement that cross-examination of Collins' expert Woodside regarding the impact of Collins[']s separate contract with

WMS be asked in hypothetical format as if the WMS contract did not exist or were unproven, when in fact, the WMS contract had previously been admitted into evidence without objection. Likewise, documentary evidence of Collins' purchases of WMS and other machines were in the record without objection and without contradiction. To further compound this error, the Court instructed the jury that hypothetical questions were not evidence and should not be considered. Again, this evidence was quite harmful – this was Collins' expert on damages who offered opinions as to the alleged financial harm done to Collins by acts of IGT.

The Court's failure to grant IGT's motion for directed verdict with regards to Collins' cause of action for breach of contract accompanied by fraudulent acts allowed the submission of highly prejudicial evidence to be submitted to the jury. This evidence was the introduction of testimony and documents attempting to show a scheme on behalf of IGT in taking back distributorships throughout North America. Only [sic] July 19, 2001, IGT made a motion in liminie [sic] to exclude any evidence or reference to such a scheme. The Court adopted Collins' argument that such evidence was relevant to the cause of action for breach of contract accompanied by fraudulent acts and unfair competition. Failure of the Court to grant IGT's motion for directed verdict as to *both* causes of action allowed Collins to introduce evidence that was highly prejudicial, not relevant, and used to illicit prejudice, passion, and caprice from the jury.

The court's rulings denied IGT a fair trial; accordingly, a new trial should be granted.

16) Collins Suffered No Damages

In addition to the above arguments, the jury verdict for damages is wholly unsupported and contrary to the greater weight of the evidence for the following reasons:

1. In order to support Collins' theory on damages, Collins was required to breach another exclusive Distributorship Agreement (WMS Agreement).

2. Collins took the position that the Distributorship Agreement only controlled and restricted the sale of competitors' products. However, Collins introduced damages for both its routes operations and sales operations.

3. Collins' damages were based upon a market analysis which included the total Pot[-O-]Gold machines manufactured by Leisure Time and sold to distributors in South Carolina from 1994 through 1998. Collins had the exclusive right to distribute Pot[-O-]Gold machines through 1998 pursuant to an agreement entered into with U.S. Games (Leisure Time) in May of 1992. But for Collins breaching this agreement in October of 1993, Collins would have maintained exclusive rights throughout Dr. Woodside's damage.

4. There is no contractual duty pursuant to the terms of the Distribution Agreement for the Defendant to make, produce or release for sale the product which is competitive with a competitor's products. Collins' damages were based on the Defendant not providing an equivalent product to that of the Pot[-O-]Gold. There was no modification to the standard product as set forth in the 1991 Distribution Agreement, and therefore, no duty to provide Collins a product which was competitive with another manufacturer's product.

5. Prior to the expiration of the Distributorship Agreement, Collins moved before the Court for specific forms of injunctive relief. The Court granted said relief, thereby extending the Distribution Agreement for an additional three years. Despite the extension, Collins did not order a single machine pursuant to the terms set forth in the 1991 Distributorship Agreement.

17) Court's [O]ther Rulings Denied IGT Fair Trial

IGT hereby incorporates any and all of its trial objections and request for rulings. The totality of the record in this case makes it clear that justice has not been done. Errors and manipulation have allowed an unbalanced and unfair presentation to the jury. This [C]ourt should remedy this grave injustice by granting a new trial.

TURNER, PADGET,
GRAHAM & LANEY, P.A.

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August 13, 2001

STATE OF SOUTH CAROLINA COUNTY OF HORRY Collins Music Co., Inc., Plaintiff, vs. IGT a/k/a IGT-North America, Defendant.	IN THE COURT OF COMMON PLEAS DOCKET NO: 94-CP-26-3266 **CERTIFICATE OF SERVICE**

This is to certify that copies of the attached Defendant's Motions for Judgment Notwithstanding the Verdict, New Trial and New Trial Remittitur, and Memorandum in Support of Motion were served upon counsel of record this 13th day of August, 2001, by mailing a copy of the same postage prepaid, and addressed as follows:

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Secretary to
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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	DOCKET NO: 94-CP-26-3266
Collins Music Co., Inc., Plaintiff,	)	**MOTIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT, NEW TRIAL AND NEW TRIAL REMITTITUR**
vs.	)	
IGT a/k/a IGT-North America, Defendant.	)	(Filed Aug. 13, 2001)

Defendant IGT a/k/a IGT-North America (hereinafter "IGT") hereby moves the Court, pursuant to Rules 50(b) and 59 SCRCP, for an Order granting IGT: (a) a judgment in favor of IGT notwithstanding the verdict as to all causes of action set forth by Plaintiff Collins Music Co., Inc. (hereinafter "Collins") in its Complaint, (b) in the alternative a new trial absolute or remittitur as to all causes of action of Collins, (c) a judgment in favor of IGT notwithstanding the verdict on the issues of Collins[']liability to IGT on each of the causes of action set forth in its Counterclaims, and for a new trial only with regard to the issues of damages recoverable by IGT in each cause of action set forth in its Counterclaims, and/or (d) in the alternative, for a new trial absolute with regard to all of the causes of action set forth in IGT's Counterclaims.

IGT's motion for judgment notwithstanding the verdict under Rule 50(b), SCRCP, is based upon the evidence presented at trial and the grounds previously relied upon in the defendant's motions for directed verdict

at the close of the plaintiff's case and renewed at the close of all evidence.

IGT's motion for a new trial under Rule 59, SCRCP, is based upon grounds that (1) under the thirteenth juror doctrine, the verdict is wholly unsupported and contrary to the greater weight of the evidence presented at trial, (2) the Court erred in the admission and exclusion of evidence as more specifically set forth herein, (3) the Court erred in instructions to the jury to include the inclusion and exclusion of specific charges requested by the parties as more specifically set forth herein, and (4) the verdict in this case was so excessive as to indicate caprice, passion or prejudice on the part of the jury.

IGT alternatively moves this Court for a new trial nisi remittitur with regard to plaintiff's causes of action for breach of contract and breach of contract accompanied by fraudulent acts. This motion is made upon the grounds that the verdict rendered by the jury is so excessive as to indicate caprice, passion or prejudice on the part of the jury and is wholly unsupported and against the greater weight of the evidence presented at trial. Specifically, IGT moves the Court for new trial nisi remittitur in the amount of $2,099,629.00 as further set forth herein.

The above motions are made and based upon the following grounds:

1) Collins' claim of damages for breach of the renewal contingency in the sales order cannot exist; it is barred by the law of this case. Collins elected its' [sic] remedy and made the law of this case.

2) Collins' claim of damages for breach of renewal contingency regarding Collins' exclusive distributorship agreement is barred as a result of Collins'

failure to seek any relief under this Court's Order dated November 17, 1994, granting injunctive relief requested by Collins.

3) The [C]ourt erred in failing to give IGT's requested charge number 25 or the modified version of charge number 25 offered in argument.

4) The only reasonable inference to be drawn from all of the evidence is that Collins could not be and was not ever harmed by an inability to purchase IGT equipment because the court ordered IGT to provide machines to Collins.

5) The [C]ourt erred in failing to rule, as a matter of law, that the integrated Distributorship Agreement imposed no duty to replicate Pot-[O]-Gold Machines.

6) The [C]ourt erred in failing to rule, as a matter of law, that Collins could not recover damages resulting from the alleged breach of a duty that never existed.

7) The [C]ourt erred in failing to rule, as a matter of law, that Collins' defective product claims are limited to any claim that equipment as delivered did not operate as ordered and as designed.

8) The only reasonable inference to be drawn from all of the evidence is that IGT equipment did operate as ordered and as designed.

9) The [C]ourt erred in instructing the jury that the jury could determine contract terms (plaintiff's request #3) when the terms are fully set out in the written agreement.

10) The [C]ourt erred in instructing the jury that the jury could consider the issue of an offer and an

acceptance (plaintiff's request #10) when the contract expressly provides the method and manner for placing orders.

11) The [C]ourt erred in instructing the jury that the plaintiff had a "reasonable time" to give general notice of a breach when the contract expressly provides a ten day window to assert a claim under the manufacturer's limited warranty. ([p]laintiff's request #18[.])

12) The [C]ourt erred in instructing the jury that the jury could consider general code remedies (plaintiff's requests #19 and #21) when the remedy of the limited warranty precludes application of other code remedies.

13) The only reasonable inference to be drawn from all of the evidence is that there is no evidence to support Collins['] claim of breach of contract accompanied by fraudulent act.

14) The Court erred in failing to apply the doctrine of judicial estoppel to bar Collins' claims and defenses.

15) The Court erred in failing to apply the doctrine of judicial admissions to bar Collins' claims and defenses.

16) The Court erred in failing to apply the doctrine of collateral estoppel to bar Collins' claims.

17) The damages awarded by the jury are inconsistent with the plaintiff's defensive position that the Distributorship Agreement does not apply to route operations.

18) The trial court erred in refusing to allow the admission (into evidence) or publication (to the jury) of Collins' pleadings.

19) The only reasonable inference to be drawn from all of the evidence is that Collins' damages, if any, were proximately caused by Collins' own acts and not the acts of IGT.

20) The [C]ourt erred in failing to rule, as a matter of law, that Collins' claimed damages were barred by public policy.

21) The [C]ourt erred in ruling that there was no evidence of public impact from Collins' acts as required by the South Carolina Unfair Trade Practices Act.

22) The [C]ourt erred in refusing to allow a complete cross-examination of Fred Collins including his personal financial information relevant to his credibility.

23) The [C]ourt erred in requiring that cross-examination of Collins' expert Woodside, regarding the impact of Collins[']' separate contract with WMS, be asked in hypothetical format.

24) The [C]ourt erred in instructing the jury that these hypothetical questions were not evidence and should not be considered.

25) The only reasonable inference to be drawn from all of the evidence is that the verdict of the jury is contrary to the weight or fair preponderance of the evidence as a matter of fact and law, and the Court should grant a new trial under the "thirteenth juror" doctrine.

26) The only reasonable 'inference to be drawn from all of the evidence is that the verdict of the jury is so excessive under the evidence as to indicate the presence of caprice, passion or prejudice on the part of the jury.

27) IGT hereby incorporates any and all of its trial objections and requests for rulings. The cumulative effects of the Court's errors and the totality of the record in this case makes it clear that IGT was substantially prejudiced thereby, and justice has not been done.

28) The Court erred in directing a verdict on IGT's statutory cause of action for unfair competition and unfair trade practices against Collins.

The above motions and the grounds therefor are supported by the evidence and record in this case and the memorandum of law submitted herewith, and such other matters as may be considered by the Court.

TURNER, PADGET, GRAHAM
& LANEY, P.A.

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ATTORNEYS FOR DEFENDANT

Florence, South Carolina

August 13, 2001

———

EXHIBIT C

STATE OF SOUTH CAROLINA COUNTY OF HORRY Collins Music Co., Inc., Plaintiff, vs. IGT a/k/a IGT-North America, Defendant.	)	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT CASE NO. 94-CP-26-3266 ORDER DENYING DEFENDANT'S MOTION FOR JUDGMENT N.O.V., NEW TRIAL, AND NEW TRIAL NISI REMITTITUR

Defendant IGT moves for a judgment notwithstanding the jury's verdict of August 2, 2001. In the alternative, it moves for a new trial, or in the alternative, it moves for a new trial nisi in the amount of $2,099,629.00.

After carefully reviewing the matter, I conclude that the motions should be denied.

As to IGT's motion for a new trial under Rule 59, SCRCP, all issues properly were addressed at trial.

As to IGT's motion for a judgment notwithstanding the verdict under Rule 50, SCRCP, I conclude that there is sufficient evidence to sustain the jury's verdict.

As to IGT's motion for a new trial nisi remittitur, I conclude that the damages awarded by the jury are within the range of damages shown by the evidence. Accordingly,

IT IS HEREBY ORDERED THAT Defendant IGT's motions for judgment notwithstanding the verdict, new

trial, or in the alternative, new trial nisi remittitur be denied.

AND IT IS SO ORDERED.

/s/ John L. Breeden, Jr.
John L. Breeden, Jr.,
Presiding Judge
Fifteenth Judicial Circuit

Conway, South Carolina
Dated: August 29, 2001

EXHIBIT D

STATE OF SOUTH CAROLINA COUNTY OF HORRY Collins Music Co., Inc., Plaintiff, vs. IGT a/k/a IGT-North America, Defendant.	IN THE COURT OF COMMON PLEAS DOCKET NO: 94-CP-26-3266 **MOTION TO ALTER OR AMEND JUDGMENT**

TO: JAMES B. VAN OSDELL, ESQUIRE; JAMES R. GILREATH, ESQUIRE; SCOTT M. MONGILLO, ESQUIRE:

You will please take notice that within ten (10) days or as soon thereafter as counsel for the Defendant may be heard, the Defendant will move before the Court to Alter or Amend its Judgment pursuant to Rule 59(e) of the

South Carolina Rules of Civil Procedure. The Defendant requests that the Court make specific rulings, and the basis therefore, as to each ground raised in Defendant's Motion for Judgment Notwithstanding the Verdict, New Trial and New Trial Remittitur filed August 13, 2001 with the Clerk of Court for Horry County; specifically:

1) Collins' claim of damages for breach of the renewal contingency in the sales order cannot exist; it is barred by the law of *this* case. Collins elected its' [sic] remedy and made the law of this case.

2) Collins' claim of damages for breach of renewal contingency regarding Collins' exclusive distributorship agreement is barred as a result of Collins' failure to seek any relief under this Court's Order dated November 17, 1994, granting injunctive relief requested by Collins.

3) The [C]ourt erred in failing to give IGT's requested charge number 25 or the modified version of charge number 25 offered in argument.

4) The only reasonable inference to be drawn from all of the evidence is that Collins could not be and was not ever harmed by an inability to purchase IGT equipment because the court ordered IGT to provide machines to Collins.

5) The [C]ourt erred in failing to rule, as a matter of law, that the integrated Distributorship Agreement imposed no duty to replicate Pot-[O]-Gold Machines.

6) The [C]ourt erred in failing to rule, as a matter of law, that Collins could not recover damages resulting from the alleged breach of a duty that never existed.

7) The [C]ourt erred in failing to rule, as a matter of law, that Collins' defective product claims are limited to any claim that equipment as delivered did not operate as ordered and as designed.

8) The only reasonable inference to be drawn from all of the evidence is that IGT equipment did operate as ordered and as designed.

9) The [C]ourt erred in instructing the jury that the jury could determine contract terms (plaintiff's request #3) when the terms are fully set out in the written agreement.

10) The [C]ourt erred in instructing the jury that the jury could consider the issue of an offer and an acceptance (plaintiff's request #10) when the contract expressly provides the method and manner for placing orders.

11) The [C]ourt erred in instructing the jury that the plaintiff had a "reasonable time" to give general notice of a breach when the contract expressly provides a ten day window to assert a claim under the manufacturer's limited warranty. ([p]laintiff's request #18[.])

12) The [C]ourt erred in instructing the jury that the jury could consider general code remedies (plaintiff's requests #19 and #21) when the remedy of the limited warranty precludes application of other code remedies.

13) The only reasonable inference to be drawn from all of the evidence is that there is no evidence to support Collins['] claim of breach of contract accompanied by fraudulent act.

14) The Court erred in failing to apply the doctrine of judicial estoppel to bar Collins' claims and defenses.

15) The Court erred in failing to apply the doctrine of judicial admissions to bar Collins' claims and defenses.

16) The Court erred in failing to apply the doctrine of collateral estoppel to bar Collins' claims.

17) The damages awarded by the jury are inconsistent with the plaintiff's defensive position that the Distributorship Agreement does not apply to route operations.

18) The trial court erred in refusing to allow the admission (into evidence) or publication (to the jury) of Collins' pleadings, as more fully detailed in paragraph eight of the Memorandum in Support of Defendant's Motions.

19) The only reasonable inference to be drawn from all of the evidence is that Collins' damages, if any, were proximately caused by Collins' own acts and not the acts of IGT.

20) The [C]ourt erred in failing to rule, as a matter of law, that Collins' claimed damages were barred by public policy.

21) The [C]ourt erred in ruling that there was no evidence of public impact from Collins' acts as required by the South Carolina Unfair Trade Practices Act.

22) The [C]ourt erred in refusing to allow a complete cross-examination of Fred Collins including his personal financial information relevant to his credibility.

23) The [C]ourt erred in requiring that cross-examination of Collins' expert Woodside, regarding the impact of Collins[']] separate contract with WMS, be asked in hypothetical format.

24) The [C]ourt erred in instructing the jury that these hypothetical questions were not evidence and should not be considered.

25) The only reasonable inference to be drawn from all of the evidence is that the verdict of the jury is contrary to the weight or fair preponderance of the evidence as a matter of fact and law, and the Court should grant a new trial under the "thirteenth juror" doctrine.

26) The only reasonable inference to be drawn from all of the evidence is that the verdict of the jury is so excessive under the evidence as to indicate the presence of caprice, passion or prejudice on the part of the jury.

27) IGT hereby incorporates any and all of its trial objections and requests for rulings. The cumulative effects of the Court's errors and the totality of the record in this case makes it clear that IGT was substantially prejudiced thereby, and justice has not been done.

28) The Court erred in directing a verdict on IGT's statutory cause of action for unfair competition and unfair trade practices against Collins

In support of this Motion, the Defendant incorporates and craves reference to its Memorandum in Support of Defendant's Motion for Judgment Notwithstanding the Verdict, New Trial and New Trial Remittitur; South Carolina law; and the South Carolina Rules of Civil Procedure.

Florence, South Carolina
September 12, 2001.

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THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

John L. Breeden, Jr., Circuit Court Judge

Opinion No. 2002-OR-405
(S.C. Ct. App. filed September 4, 2002)

Collins Music Co., Inc., Respondent,

v.

IGT a/k/a IGT-North America, Petitioner.

PETITION FOR A WRIT OF CERTIORARI

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INDEX

Certificate of Counsel 3

Questions Presented 4

Statement of the Case 4

Arguments

1. A REHEARING ON THE MERITS IN THE COURT OF APPEALS IS REQUIRED BECAUSE A QUORUM DID NOT EXIST TO ISSUE A FINAL ORDER WHEN JUDGE CURETON WAS SUBSTITUTED FOR JUDGE GOOLSBY ONLY TO CONSIDER IGT'S PETITION FOR REHEARING 6

2. THE COURT OF APPEALS IMPROPERLY EXTENDED THE RULING IN *QUALITY TRAILER*[1] TO THIS CASE 8

[1] Quality Trailer Products, Inc. v. CSL Eqpt. Co., Inc. and I. Corp., 349 S.C. 216, 562 S.E.2d 615 (2002).

3. THE COURT OF APPEALS DISREGARDED PRIOR ERROR PRESERVATION LAW BY HOLDING THAT A TRIAL JUDGE'S IMPLICIT RULING PRESERVES ISSUES FOR APPEAL 11

4. A MOTION BROUGHT UNDER RULE 59(e), SCRCP, WHICH SEEKS ONLY 59(e) RELIEF AND ARGUABLY RAISES UNPRESERVED ISSUES TO THE TRIAL COURT IS SUFFICIENT TO TOLL THE TIME FOR APPEAL 14

5. IGT'S RIGHT TO DUE PROCESS HAS BEEN VIOLATED 16

6. IGT'S RIGHT TO EQUAL PROTECTION HAS BEEN VIOLATED 22

Conclusion 25

CERTIFICATE OF COUNSEL

Counsel for Petitioner ("IGT") certifies that a Petition for Rehearing, Petition for Rehearing *en banc*, or in the Alternative for Certification, was timely made before the South Carolina Court of Appeals. IGT's Petition for Rehearing has now been denied by Order of the Court of Appeals dated May 12, 2003. Accordingly, counsel for IGT is filing this Petition for Writ of Certiorari to comply with the requirement of Rule 226(c), SCACR, that the Petition be filed within thirty (30) days following the denial of its Petition. However, two matters remain pending in the Court of Appeals.

Contemporaneously, with its denial of IGT's Petition for Rehearing on May 12, 2003, the court also issued a remittitur to the trial court. IGT on May 15, 2003 petitioned the court to recall the remittitur and to withhold it

for thirty (30) days in compliance with Rule 221(b), SCACR. On May 30, 2003, the Court of Appeals requested Collins to file a formal return to the petition within ten (10) days, and this return was received by IGT on June 9, 2003.

Second, in its petition to the Court of Appeals, IGT also requested that it reveal to IGT the reason or reasons and the timing of Judge Goolsby's disqualification and recusal from the panel quorum. This issue also remains pending in the Court of Appeals.

To comply with the time constraints contained in Rule 226(c), SCACR, IGT is filing this Petition.

QUESTIONS PRESENTED

1. Is the final order dismissing IGT's appeal invalid?

2. Did the Court of Appeals err in extending the rule in *Quality Trailer* to dismiss petitioner's appeal when the facts here are not comparable to those of *Quality Trailer*?

3. Did the Court of Appeals err in holding, contrary to all error preservation precedent, that a trial judge's implicit ruling on issues in a post-trial order preserved those issues for appellate review?

4. Did the Court of Appeals err in holding petitioner's motion, brought under Rule 59(e), SCRCP, which raised issues at least arguably not ruled on by the trial judge and only sought 59(e) relief, was not sufficient for the purpose of tolling the time for filing a notice of appeal?

5. Has IGT been denied due process?

6. Has IGT been denied equal protection?

STATEMENT OF THE CASE

An unusual series of events brings IGT back to this Court for one reason: to obtain a hearing on its appeal of a $15 million jury verdict entered in favor of Collins Music Co., Inc. ("Collins"). After the jury returned its verdict, IGT moved the trial court for judgment notwithstanding the verdict ("JNOV") and a new trial. The trial court issued an order that did not rule on arguments raised by IGT and also altered the basis for prior rulings. IGT filed a Rule 59(e) motion asking the trial court to alter or amend its order by indicating whether it had ruled on each of the 28 arguments raised in IGT's motion for JNOV and new trial and to specify the basis for each ruling.

The Court of Appeals improperly extended the rule in *Quality Trailer* and dismissed IGT's appeal. By dismissing IGT's appeal, the Court of Appeals, tailor-making a rule to govern IGT's case that had not previously been applied, held that a 59(e) motion is not appropriate *even where* the movant seeks clarification of the trial court's denial of its post-trial motion. *Collins Music Co. v. IGT*, Op. No. 2002-OR-405 (S.C. Ct. App. filed September 4, 2002).

The Court of Appeals' decision raises serious issues of due process and equal protection under the United States and South Carolina Constitutions. The standard adopted by the Court of Appeals has led to an arbitrary and random result. Prior and subsequent appellate court decisions

made it incumbent upon a litigant to preserve issues for appeal by pressing the trial court to specifically and explicitly rule on each issue.[2] The Court of Appeals has concluded that in its hindsight view the trial court did rule on all issues notwithstanding IGT's conclusion to the contrary. Such a hindsight view, in the face of its uncertainty, is violative of the IGT's due process rights.

On March 5, 2003, one month after it filed its certiorari petition, this Court granted a petition for a writ [of] certiorari in the case *Elam v. S.C.D.O.T.*, Op. No. 0000-00-000, but subsequently denied IGT's petition. The *Elam* appeal was dismissed by the Court of Appeals based upon the ***identical*** tolling issues. Principles of judicial equal protection should guide this Court, while considering *Elam*, to either grant IGT's petition or hold it until the *Elam* case is decided.

This Court's previous consideration for certiorari was premature, because there was no final decision of the Court of Appeals. The Court of Appeals' panel of Judges Goolsby, Connor, and Anderson granted Collins' Motion to Dismiss by order dated September 4, 2002. IGT filed a timely petition for rehearing by that panel, for rehearing *en banc,* and alternatively, for certification to this Court pursuant to Rule 204, SCACR.

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[2] See *Hancock v. Wal-Mart*, Op. No. 3645 (S.C.Ct.App. filed June 2, 2003) (citing *Noisette v. Ismail*, 304 S.C. 56 (1991), "finding issue was preserved for appellate review where the trial judge did not explicitly rule on appellant's argument and appellate [sic] made no Rule 59(e) motion.")

The appeal was certified by this Court. The Court of Appeals requested certification despite the fact that it had already issued an order determining the appeal and had not vacated that order. After certifying the case, this Court held only that the petition for rehearing *en banc* was denied and directed IGT to file a petition for writ of certiorari, despite the fact that a final order of the Court of Appeals did not exist. As directed, a petition was filed and then denied by this Court on April 24, 2003, with Chief Justice Toal voting to grant certiorari. However, as the Court of Appeals failed to rule on *either* petition for rehearing, IGT respectfully submits there was no final decision to which a writ of certiorari could issue pursuant to Rule 226, SCACR.[3]

Therefore, IGT petitioned the Court of Appeals to comply with Rule 226(c), SCACR, and issue a final decision by ruling on the petition for rehearing. On May 12, 2003, the petition for rehearing was finally considered and denied. Contrary to Rule 221(b), SCACR, the order also directed immediate remittitur. Although questions remain as to the validity of the reconstituted panel's denial of the petition for rehearing, a denial has now occurred, and this petition follows.

---

[3] Rule 226(c), SCACR, provides that, "A decision of the Court of Appeals is not final until the petition for rehearing has been acted on by the Court of Appeals."

ARGUMENT

INTRODUCTION:

This petition is not simply a reiteration of prior arguments. Argument 1 addresses the subsequent proceedings in the Court of Appeals following this Court's denial of IGT's prior writ of certiorari. Arguments 5 and 6 set forth the significant violations of IGT's due process and equal protection rights afforded by the South Carolina and United States Constitutions. The constitutional arguments are set up by and premised upon the state law matters here involved. Therefore, the constitutional arguments follow those regarding state law.

1. A REHEARING ON THE MERITS IN THE COURT OF APPEALS IS REQUIRED BECAUSE A QUORUM DID NOT EXIST TO ISSUE A FINAL ORDER WHEN JUDGE CURETON WAS SUBSTITUTED FOR JUDGE GOOLSBY ONLY TO CONSIDER IGT'S PETITION FOR REHEARING.

The Court of Appeals issued an Order on May 12, 2003, denying IGT's Petition for Rehearing. IGT contends that the Court of Appeals lacked the proper quorum to issue the Order, as Judge Cureton, who was substituted on the panel for Judge Goolsby, did not participate in all aspects of the decision.

IGT requested in its petition of April 29, 2003, that the Court of Appeals assemble a qualified panel to rule on IGT's Petition for Rehearing and / or vacate the Dismissal Order and have a new panel rule on Collins' Motion to Dismiss. *S. C. Code Ann.* §14-8-80 (d) (1976) directs that three judges are necessary to constitute a quorum of the

Court of Appeals. This Court has held that no valid act can be done in the absence of a quorum and that a quorum does not exist where a panel member participates in the decision without actually being present for oral arguments. *State v. McMillan*, 349 S.C. 17, 561 S.E.2d 602 (2002). To substitute Judge Cureton for Judge Goolsby on the panel without actually rehearing the Motion is analogous to the situation which occurred in *McMillan,. supra.* A proper reconstitution of the panel requires the Court to reconvene, review the briefs, hear oral arguments, and issue a decision in which all qualified panel members participate in all aspects of the decision.[4]

A rehearing in the Court of Appeals is also required because there is no final order determining IGT's appeal. After the panel issued its order dismissing IGT's appeal, but before ruling on IGT's petition for rehearing and rehearing en banc, four judges were recused, including a panel judge, making it impossible for the panel or the Court of Appeals to rule on any matter in this case. The court asked this Court to certify the case pursuant to Rule 204(b) SCACR. A case can only be certified "**before** it has been determined by the Court of Appeals." Rule 204(b), SCACR, (emphasis added). This is the procedure the Court of Appeals followed when the same situation occurred in *Quality Trailer*. There, the court recognized the constraint of Rule 204(b), and issued an Order that **vacated** the

[4] The Court of Appeals may in its discretion decide a case without oral argument. Rule 215, SCACR. However, in this case the Court's decision was based on the briefs and oral argument. Judge Cureton did not participate in that process and it was inappropriate for him to simply deny the petition for rehearing.

decision dismissing the appeal and then requested certification of the case by this Court. Thus the opinion dismissing IGT's appeal was not a final order and should have been formally vacated when this case was certified to this Court. No subsequent action created a final order. This Court ruled that IGT's petition for rehearing *en banc* was deemed denied, but did not resolve the petition for rehearing. The previous denial of IGT's petition for writ of certiorari did not resolve the merits of the appeal. The Court of Appeals' order dismissing the appeal is not final and was implicitly vacated. Any subsequent action by the Court of Appeals did not create a final order because a qualified panel quorum has not been properly constituted. A final order can be entered only by granting this petition for certiorari, formally vacating the decision dismissing IGT's appeal, and remanding it to the Court of Appeals for a rehearing by a properly constituted panel each of whom will participate in all aspects of the decision. Alternately, this Court, pursuant to Rule 204(b), may take this matter for all purposes to decide the merits of the appeal as it did in *Quality Trailer*.

2. THE COURT OF APPEALS IMPROPERLY EXTENDED THE RULE IN *QUALITY TRAILER* TO THIS CASE.

The Court of Appeals improperly extended the *Quality Trailer* decision. The court has held that a Rule 59(e) motion is not appropriate even where the movant *seeks something new* – i.e., a specific ruling on claims not explicitly resolved in the order denying the post-trial motions, so long as it appears to an appellate court, subjectively and in hindsight, that the trial court decided all issues, despite the fact that it qualified the order. That is, Rule 59(e) is

not an appropriate vehicle unless the appellant has a clear and definite need in the eye of the appellate court for the clarification he seeks. This extension is contrary to all error preservation law and is impossible to discern or follow at the post-trial stage.

The Court of Appeals makes two crucial errors in extending *Quality Trailer*. First, it mischaracterizes IGT's 59(e) motion as identical to that of the appellant in *Quality Trailer*. Second, the Court of Appeals mischaracterized IGT's 59(e) motion as successive because it asked the circuit court to specifically rule on the grounds in the post-trial motions.

Unlike this Court in *Quality Trailer*, the Court of Appeals makes no reference to the relief IGT sought in its post-trial motions and a comparison of it with the relief sought in *Quality Trailer*. In fact, reading the dismissal order without more leads the reader to the erroneous impression that IGT's 59(e) motion requested JNOV and new trial relief, not, as actually requested, specific or explicit rulings. The entire premise of this Court's decision in *Quality Trailer* turned on its comparison of the relief sought in appellant I. Corp.'s post-trial motions with that sought in its motion captioned under 59(e). This Court, pointing out that both motions sought identical relief (JNOV and new trial), concluded correctly that the second motion was factually a successive JNOV and new trial motion, not a 59(e) motion as captioned.

Even a cursory review of the two I. Corp. motions reveals the rationale of this Court's decision in *Quality Trailer*. In its JNOV motion, I. Corp. prayed for the following:

> . . .[I. Corp.] ***respectfully prays to have the jury verdict and judgment of $86,314.53 in favor of Plaintiff, set aside and to have judgment entered in accordance with I. Corp's Motion*** for Directed Verdict ***and in support thereof states***:. . .(emphasis added.)[5] (App. p. 179).

In its second motion, captioned "59(e)", I. Corp. prayed for the exact relief sought in its initial motion:

> . . . [I.Corp] ***respectfully prays to have the jury verdict and judgment of $86,314.53 in favor of Plaintiff, set aside and to have judgment entered in accordance with I. Corp's Motion*** for Judgment Notwithstanding the Verdict and ***with I. Corp's Motion for Directed Verdict*** or in the alternative prays for a new trial in accordance with I. Corp's Motion for New trial ***and in support thereof states***: . . . (emphasis added.) (App. p. 205).

The circumstances in the case at bar are completely different. A comparison of IGT's corresponding motions clearly reflects that IGT did not seek the same relief twice. IGT's post-trial motions for JNOV, new trial, and new trial nisi remittitur, requested the following relief:

> . . . IGT hereby moves the Court . . . for an Order granting IGT: (a) a judgment in favor of IGT notwithstanding the verdict [for Collins' causes of action] . . . (b) in the alternative a new trial absolute or remittitur to all causes of action of

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[5] In a separate post-trial motion, I. Corp. prayed for a new trial on the same grounds as contained in its JNOV motion. (App. p. 194).

> Collins, (c) a judgment in favor of IGT notwithstanding the verdict [on IGT's counterclaims] . . . (d) in the alternative, for a new trial absolute with regard to all of the causes of action set forth in IGT's Counterclaims. (App. p. 146).

Following the trial judge's one-page order denying these motions, IGT sought in its 59(e) motion relief consistent with the rule and entirely different from its initial motions:

> The Defendant requests that the Court make specific rulings, and the basis therefore, as to each ground raised in Defendant's Motion for Judgment Notwithstanding the Verdict, New Trial and New Trial Remittitur filed August 13, 2001 with the Clerk of Court for Horry County. (App. p. 171).

IGT requested new relief consistent with Rule 59(e) – specific rulings. The Court of Appeals acknowledged that IGT was "seeking an order more specifically address[ing] each claim", something not true in *Quality Trailer.* The Court of Appeals' decision, disregarding the relief IGT sought, is an expansion of *Quality Trailer*'s condemnation of 59(e) motions that do not seek anything new. It also sharpens an appellant's dilemma. Reading a trial court's intent and deciding when you have a definite need for clarification is difficult if not impossible where the trial court has not embodied that intent in a clear and straightforward resolution of an appellant's arguments.

The court compounds the first error by noting that IGT's 59(e) motion includes the same grounds found in its post-trial motions, and on that basis, mischaracterized IGT's motion as a successive JNOV and new trial motion. IGT repeated the grounds in its 59(e) motion only to be

certain that each issue, even if not explicitly ruled on, would be preserved for appellate review. Motions are defined by the *actual relief they seek*, and not by the grounds supporting it. "The court will construe [the motions], however styled, to be the type proper for the relief requested." *Demeres v. Roncor, Inc.*, 1992 U.S. App. LEXIS 14984 (9th Cir. 1992).

Clearly I. Corp's fatal error was requesting JNOV and new trial two times, by asking the trial court to reverse itself and grant the initial motions. This Court's holding in *Quality Trailer* should not be extended to apply here where a prospective appellant was only preserving the issues for appeal.

3. THE COURT OF APPEALS DISREGARDED PRIOR ERROR PRESERVATION LAW BY HOLDING THAT A TRIAL JUDGE'S IMPLICIT RULING PRESERVES ISSUES FOR APPEAL

The improper disregard of error preservation law by the Court of Appeals in this case has serious ramifications not only for IGT, but for the trial bar or any party with a case currently on appeal or in the post-trial stage. There is confusion about what action a party must take to preserve error when it believes there to be ambiguities or inexplicitness in the trial judge's order denying post-trial motions. Appellants are placed in a "catch-22": if a 59(e) motion is made, the Court of Appeals may disagree about its necessity and hold the party outside the time for filing its appeal. If the motion is not made, the Court of Appeals may disagree and hold that issues were not preserved.

Case law is replete with admonitions from this Court that, above all other appellate practice rules, preservation of issues for appeal is paramount. In *Kennedy v. The S.C. Retirement System*, 349 S.C. 531, 564 S.E.2d 322 (2001), this Court stated, "We reiterate this Court's longstanding principle of error preservation. 'Preserving issues for appellate review is a fundamental component of appellate practice. South Carolina appellate courts do not recognize the plain error rule.'" (Quoting Hon. Jean H. Toal, et al., *Appellate Practice in South Carolina* 65 (1999)).

There are countless instances where appellate courts have refused to hear issues not properly preserved by a Rule 59(e) motion. As noted by Chief Justice Toal, "[W]here a party raises an issue, the trial court fails to rule upon the issue, and the party fails to raise the court's omission by way of a Rule 59 motion, the issue is not ruled upon and, therefore, not preserved on appeal .... When an order is internally inconsistent, that inconsistency must be raised to the trial court by way of a post-trial motion before it is preserved for appellate review .... A post trial motion must also be made where there are *errors or inconsistencies* in the trial court's final order." (Hon. Jean H. Toal, et al, *Appellate Practice in South Carolina*, 59 (2d ed. 2002) citing *Great Game, Inc. v. S. C. Dept. of Revenue*, 339 S.C. 79, 529 S.E.2d. 6 (2000); *Parker v. Shecut*, 340 S.C. 460, 531 S.E.2d 546 (Ct. App. 2000), *reversed on other grounds*, 349 S.C. 226, 562 S.E.2d 620 (2002); *Grant v. S.C. Coastal Council*, 319 S.C. 348, 461 S.E.2d 388 (1995)).

Our appellate courts have also held that 59(e) motions are required to preserve for appeal any issue not explicitly

ruled upon.[6] In *Noisette*, 304 S.C. 56, 403 S.E.2d 122 (1991), a case cited in over thirty-five error preservation decisions, this Court held that although the trial judge ruled on an issue (whether the defendant was an "insured" under an insurance policy), his ruling was not explicit as to whether the defendant was a "permissive user". Although the only way appellant could have been an insured was as a permissive user, because appellant failed to seek an explicit ruling with a 59(e) motion, this Court would not consider the issue on appeal.

IGT made a reasonable determination that the trial judge's order did not explicitly rule on all of the twenty-eight grounds contained in its post-trial motions. For instance, by denying *all* new trial motions because, "all issues [were] properly addressed at trial", the trial judge clearly failed to rule on IGT's motion for new trial under the thirteenth juror doctrine, made for the first time *after* trial. The order only dealt with Collins' claims, and failed to treat the issues relating to IGT's counterclaims, to which at least twenty of the twenty-eight grounds pertained.[7] Additionally, by using the "sufficiency of the evidence" basis to deny *all* JNOV issues (which included both rulings of law by the judge at trial and sufficiency of

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[6] See *I'On L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000); *Summer v. Carpenter*, 328 S.C. 36, 492 S.E.2d 55 (1997); *Pelican Bldg. Ctrs. v. Dutton*, 311 S.C. 56, 427 S.E.2d 673 (1993); *Noisette v. Ismail*, 304 S.C. 56, 403 S.E.2d 122 (1991); *Shealy v. Aiken Co.*, 341 S.C. 448, 535 S.E.2d 438 (1991); *Trivelas v. S.C. D.O.T.*, 348 S.C. 124, 558 S.E.2d 271 (Ct. App. 2001); *Vespazianni v. McAlister*, 301 S.C. 411, 415 S.E.2d 427 (Ct. App. 1992) et al.

[7] See grounds 3, 4, 5, 8, 9, 10, 11, 12, 14, 15, 17, 18, 21, 22, 23, 24, 25, 26, 27, and 28 in IGT's post-trial motions. (App. p. 147-150).

evidence for the jury), it was unclear whether the judge had considered the JNOV grounds that were purely on issues of law.[8] Guided by *Noisette* and similar cases, IGT filed a 59(e) motion requesting the judge to specifically rule and state the basis as to each issue.

The Court of Appeals, relying on Rule 52(a), SCRCR, stated, "the requirement imposed upon the court by Rule 52(a), SCRCP [to make findings of fact and law], . . . is limited to cases tried without a jury or with an advisory jury and is inapplicable here." *Collins v. IGT* at 7 (2002). This view, relying on Rule 52(a), is inherently flawed and contrary to precedent. If a trial judge's obligation for explicitness is tied to making findings of fact and law under Rule 52(a), 59(e) motions would never be required following a jury trial, or any other situation where Rule 52(a) does not require findings of fact and law. This is clearly not the law in South Carolina.

For instance, Rule 52(a) *specifically* makes findings of fact and law unnecessary in orders addressing summary judgment ("findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 . . . ", Rule 52(a), SCRCP). However, despite this clear exemption, our appellate courts require 59(e) motions to preserve issues not "explicitly" ruled upon in summary judgment orders. (See *Summer v. Carpenter*, *id.*; *Trivelas*

[8] See grounds 14, 15, 16, 17, 18, 24, 27, and 28 of IGT's post-trial motions. This ruling was also confusing because the judge addressed the issues as matters of law at trial. However, in the order, all JNOV issues were addressed as evidentiary matters – raising questions of whether the judge intended to change the basis of his rulings or simply did not rule on those issues at all.

v. S.C. D.O.T., id., et al). *Walker v. The Bluffs Apartments*, 324 S.C. 350, 477 S.E.2d 472 (Ct. App. 1995).

In *Walker* and the other cases cited above, the Court of Appeals makes no mention of either Rule 52(a) or its exemption of Rule 56 decisions from its requirement of specific findings of fact and law. Instead, the court *required* an explicit ruling even though the trial judge had no obligation to make findings of fact or law. However, the Court of Appeals' view in IGT's case of the explicit ruling requirement is completely contrary to this line of cases.[9]

The Court of Appeals' disregard of previous error preservation cases is even more evident considering *Payton v. Kearse*, 319 S.C. 188, 460 S.E.2d 233 (Ct. App. 1995) (rev. on other grounds), *a jury trial*, where the Court of Appeals refused to hear an issue not properly addressed by the trial court and not preserved by a 59(e) motion. The court held that although the issue on appeal was *clearly raised* to the trial judge, and the judge *clearly denied* the new trial, the issue was not preserved because the order failed to specifically address it, and no 59(e) motion was made. The trial court's post-trial order here did not explicitly address any of IGT's issues, but the Court of Appeals ignored this omission. Moreover, the court punished IGT for making a 59(e) motion – a motion it required the appellant in *Payton* to make.

Our courts have never held that the explicit ruling obligation of a trial judge does not apply to jury cases.

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[9] Also see *Hancock v. Wal-Mart*, cited in footnote 2, which was based upon unpreserved issues in a summary judgment order. The case was decided just last week.

Case law requires 59(e) motions for inexplicit rulings in both jury trials and cases where Rule 52(a) requirements are not applicable. IGT reasonably believed that the order denying its post-trial motions was not sufficiently explicit to preserve all issues for appeal.

4. A MOTION BROUGHT UNDER RULE 59(e), SCRCP, WHICH SEEKS ONLY 59(e) RELIEF AND ARGUABLY RAISES UNPRESERVED ISSUES TO THE TRIAL COURT IS SUFFICIENT TO TOLL THE TIME FOR APPEAL.

Rule 1, SCRCP, provides that the rules are to be construed to achieve just determinations. This statement is consistent with Rule 8(f), providing that pleadings should be construed to "do substantial justice." Retroactive application of new rules is only appropriate where it will not "work injustice." See *Graham v. Dorchester Co. School Dist.*, 339 S.C. 121, 528 S.E.2d 80 (Ct. App. 2000). The decision here does not comport with the intent of the rules.

IGT's 59(e) motion raised issues that were arguably unpreserved. The Court of Appeals obviously disagreed. Instead of viewing the motion as sufficient to toll the time for appeal,[10] the court created a new condition, making the tolling provision dependent upon a hindsight determination of a 59(e) motion's necessity. Such a rule requires parties to clairvoyantly forecast, as through a crystal ball, a court's view of the necessity of the motion. This is without precedent and is unfair.

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[10] Rules 203(b)(1), SCACR and 59(f), SCRCP.

The Court of Appeals' decision ignores federal precedent. In *Coward Hund*, 336 S.C. 1, 518 S.E.2d 56 (Ct. App. 1999), the court looked solely to federal precedent, as no South Carolina authority existed. (citing *Brown v. United Ins. Co. of Am.*, 807 F.2d 1239 (5th Cir. 1987)). In reviewing the standard for "proper" 59(e) motions, the court should also have considered federal precedent in determining the sufficiency of the motion for purposes of tolling.

Federal courts apply a less-strict standard when addressing the tolling effect of the motion. Federal courts view motions which even arguably could be 59(e) motions as proper for tolling purposes. A Rule 59(e) motion need not include any new material. It can merely rehash arguments and claims made at trial, and it will still suffice under the rule to toll the appellate clock. *See Clipper Express v. Rocky Mountain Tariff*, 690 F. 2d 1240, 1248 :

> Defendants contend that Clipper's [59(e)] motion, without affidavits, advances no new grounds for vacating the judgment. A motion which simply rehashes arguments heard at trial, defendants contend, does not properly lie under 59(e). Assuming arguendo that Clipper's 59(e) motion raises no new grounds, it nevertheless constitutes a proper 59(e) motion.

In *Sierra-On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415 (9th Cir. 1984), the court stated that even if a 59(e) motion is inartfully drawn or so defective that it could not properly be granted, it is still enough to toll the time for appeal.

Other federal cases follow the same principle. (See *Barnett v. Cross*, 893 F.2d 1336 (6th. Cir. 1990) and *Cloud v. Summers*, 110 F.3d 67 (9th Cir. 1997)). In *Cloud*, the

court held, "As we have ruled, if a motion served within ten days of judgment could have been brought under Rule 59(e), the motion tolls the time for appeal even if Rule 59 is not expressly invoked." (emphasis added.)

Every effort should be given to construe state law in a manner whenever possible so as to avoid any substantial federal constitutional questions. This principle has long been established and advocated by the United States Supreme Court. See *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346-47, 80 L. Ed. 688, 56 S. Ct. 466 (1936) (Brandeis, J., concurring). The Ashwander Principle has clearly not been followed by the Court of Appeals in this matter, and its omission has created substantial federal questions that must be addressed.

5. IGT'S RIGHT TO DUE PROCESS HAS BEEN VIOLATED.

The South Carolina Constitution creates a right to an appeal. Property rights, under the 14th Amendment, are themselves created by state law, including the State Constitution. *Perry v. Sindermann*, 408 U.S. 593 (1972); *Board of Regents v. Roth,* 408 U.S. 564 (1972); ("Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . "). *See also Fuentes v. Shevin*, 407 U.S. 67 (1972). Having created a self-styled "right" of appellate access in its own Constitution and statutes, South Carolina may not deprive people of that right without meeting due process standards. *See, e.g., M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) (striking down, on a combination of due process and equal protection grounds, a state's appellate access regime.) (*see also*

Griffin v. Illinois, 351 U.S. 12 (1956) (applying the due process clause to invalidate limits on state-created rights of appeal.)

Once established, avenues of appellate review "must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." *Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966). There is substantial evidence in this case that the Court of Appeals acted unreasonably, and perhaps even invidiously, by tailor making a rule to govern IGT's appeal that it has not applied before or since. There are numerous cases just within the last ten years in which appellants followed the *identical* course of action as IGT; however, these cases were not dismissed, but were properly adjudicated on the merits.[11] In each case, a jury verdict was returned and the appellant then filed a motion for new trial and JNOV which was subsequently denied in a written order identical to the same order in IGT's case. Following this denial, all of these appellants then filed a Rule 59(e) motion requesting that the trial judge either "reconsider" a matter or "rule on" a matter, which also was subsequently denied. Only after this denial did the parties file a notice of appeal – well outside the thirty days allowed from the issuance of the original order. Unlike IGT's situation, not one of these

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[11] See *Wooten v. S.C.D.O.T.*, 333 S.C. 464 (1999); *Mullis v. Trident Emergency Physician*, Op. No. 3548 (S.C. Ct. App, filed September 9, 2002); *Rorrer v. P.J. Club, Inc.*, 347 S.C. 560 (Ct. App. 2001); *Curcio v. Caterpillar*, 334 S.C. 266 (Ct. App. 2001); *Hundley v. Rite Aid*, 339 S.C. 285 (Ct. App. 2000); *James v. Lister*, 331 S.C. 277 (Ct. App. 1998); *Krepps v. Ausen*, 324 S.C. 597 (Ct. App. 1996); *Johnson, et al v. Hoechst Celanse*, 317 S.C. 415 (Ct. App. 1995); *Hassel v. National States*, 313 S.C. 266 (Ct. App. 1993).

parties ever had their appeal challenged – much less dismissed – because they filed a Rule 59(e) motion.

Prior to the grant of Collins' motion to dismiss in this case, a Rule 59(e) motion that sought clarification and explicit resolution of arguments raised but not expressly addressed by the trial court had been considered "appropriate" for purposes of tolling the appellate clock. The Court of Appeals expanded and rewrote this Court's *Quality Trailer* standard to mean that so long as one could conceivably believe the trial judge had subjectively intended to resolve the arguments before, a motion under Rule 59(e) for clarification or explicit resolution will not be considered appropriate. And yet, in *Mullis*, *id.* (footnote 11)[,] a case decided *after* IGT's appeal was dismissed, the Court of Appeals seemed to apply its prior approach to Rule 59(e), creating the impression that the IGT ruling was fashioned in an *ad hoc* manner. This possibility is buttressed by the decision to replace Judge Goolsby for purposes of the rehearing petition, but to allow the prior dismissal (with Judge Goolsby participating) to stand when no appellate court rule or procedure suggested this approach.

If the Court of Appeals was not fashioning a result simply for IGT, but rather was fashioning a broad extension of *Quality Trailer* for application more generally, two other due process problems are raised. First, the standard adopted by the Court of Appeals leads to arbitrary and random results. The rule does not produce predictable results which provide would-be appellants with a fair opportunity to obtain their statutory right to an appeal. The Court of Appeals, in fact, has applied this rule in a way that allows some litigants, (the appellant in *Mullis*) to obtain a hearing on the merits of their appeal, while

others (IGT and the South Carolina Department of Transportation) do not.

The rule puts an appellant in an untenable position. He can forgo making a Rule 59(e) motion in order to pursue a timely appeal; if he chooses that course, his appeal may be timely, but he runs the risk of later being told his appellate issues are not preserved because they were not adequately ruled upon below. See *Hancock v. Wal-Mart*, *id.* Or, in order to assure preservation, he can make a Rule 59(e) motion for clarification, but then risk later being told such a motion was not necessary because the trial judge intended to resolve the issues earlier. In that case, his time for filing an appeal will not have been tolled, and a timely appeal will in most circumstances be impossible.

Procedural rules should not create dilemmas. What makes this dilemma unusual and constitutionally problematic is that there is high uncertainty about the key question posed by the Court of Appeals' subjective test – whether the trial judge who qualified his order did or did not intend to resolve an appellant's claims – making the results like a lottery. There is no way for a reasonable person to predict, with any accuracy, how the test that the Court of Appeals fashioned in this case will be applied. Therefore, an appellant cannot secure and protect his statutory right to an appeal. A state cannot provide the right of an appeal and then dole that right out in a completely haphazard way that rewards only those who are lucky enough to have satisfied the Court of Appeals' vague and unpredictable standard. The law does not have to have the precision of a mathematical formula, but its application cannot be as random as a coin toss either.

Second, even if the Court of Appeals' subjective test – which effectively requires an appellant to demonstrate a clear need for clarification before invoking Rule 59(e) – were completely workable and predictable, its application to IGT would still raise due process problems because before the Court of Appeals' ruling in this case, the courts misled IGT into believing it would have the benefit of an appeal. "Due process forbids the government from actively misleading a citizen" about the law. *Sundstrom v. U.S.*, 419 U.S. 934 (Douglas, J., dissenting); *see also Cox v. Louisiana*, 379 U.S. 559 (1965) (holding that government cannot mislead protestors into believing they would not be fined); *Raley v. Ohio*, 360 U.S. 423.; *Zauderer v. Office of Discipline*, 471 U.S. 626, 669 (concurrence/dissent) ("Such a potential trap for an unwary attorney [exercising his right to free speech] acting in good faith . . . works a significant due process deprivation.")

This bedrock due process principle applies to courts as well as other state government institutions. *See Brinkerhoff-Faris*, 281 U.S. 673 ("The violation is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid state statute. The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive, or administrative branch of government.") Though the Supreme Court acknowledged in *Brinkerhoff* that the common-law-making process means that statutes and prior decisions will get revisited, reconsidered and revised, and that this uncertainty about the exact state of the law at any given point is something that does not violate due process, it noted that the situation is different when prior case law clearly promises a litigant access to review of his/her claim – to a procedure for

vindicating one's substantive rights – and then a subsequent case closes the door to that review entirely and retroactively. Said the Court: "Our present concern is [not with the merits of plaintiff's claim, but rather] solely with the question whether the plaintiff has been accorded due process in the primary sense-whether it has had an opportunity to present its case and be heard in its support." *Brinkerhoff-Faris*, at 681.

The principles underlying *Brinkerhoff-Faris* have application to appellate access, not just trial court access. For example, a number of Courts of Appeals have stated that due process prevents the federal government from misleading aliens as they pursue administrative appeals in deportation proceedings, even though the federal government may not have to provide the appeals in the first place. *See, e.g., Padilla-Agustin*, 21 F. 3d. at 978; *Vargas-Garica v. INS*, 287 F. 3d 882. Federal courts have also applied the same principle to other appellate settings. *See, e.g., Redner v. Dean*, 29 F. 3d 1495, 1502 (11th Cir.) ("We find it repugnant to the principle of due process that a county ordinance could set such a trap for the unwary applicant. To hold that an aggrieved applicant who follows the appellate procedure provided by the ordinance risks foreclosing his opportunity for prompt judicial review is a leap in logic we are unprepared to take.")

Applying these principles to the present case, before the Court of Appeals' original order, South Carolina, had led IGT to believe it would be able to toll the 30 day appellate clock by making a good-faith motion under Rule 59(e). To begin with, all of the state cases requiring explicit resolution of issues before they would be preserved on appeal led IGT to believe it could – indeed had to – make a

Rule 59(e) motion and that such a motion would be considered appropriate. Even *Quality Trailer*, by its own terms, did not call into question what IGT did here, because unlike the appellant in *Quality Trailer*, IGT *did explicitly seek clarification* in its Rule 59(e) motion.

In any event, to the extent that *Quality Trailer* overruled previous South Carolina law, it cannot be applied retroactively under the principles in *Brinkerhoff-Faris*. Here, IGT filed its Rule 59(e) motion before *Quality Trailer* came down. South Carolina courts have long applied decisions creating a new liability prospectively. See, e.g., *Douglass v. Florence General Hospital*, 273 S.C. 716, 259 S.E.2d 117 (1979). Those cases involve the creation of liability where none previously existed. When a court has created a new cause of action or eliminated immunity, it has opted (indeed, it seems it felt obligated) to apply the decision prospectively only. The cases do not, however, appear to be limited solely to the creation of monetary liability. See *State v. Anderson*, 312 S.C. 185, 439 S.E.2d 835 ("Because of the uncertainty and confusion that is taking place at all levels of the judiciary regarding this issue, we take this opportunity to explicitly prohibit the practice of prosecutors appearing as the sole witness before the grand jury. As with any creation of a new liability where formerly there was none, this rule must be applied prospectively.")

However, it is more than the *Noisette* issue-preservation line of cases that did the misleading. So too did the declaration by our appellate courts that where there is no state law to the contrary, federal precedents will be followed in construing South Carolina Rule 59(e). *See, e.g. Gardner v. Newsome*, 304 S.C. 328, 329 (1991) ("Since our Rules of Procedure are based on the Federal

Rules, where there is no South Carolina law, we look to the construction placed on the Federal Rules of Civil Procedure.") And yet under Federal Rule 59(e), a motion for more explicit rulings is considered appropriate for purposes of tolling the appellate clock. *See, e.g., Hulsey v. Sargent*, 15 F. 3d 115 (8th Cir. 1994) (motion for reconsideration that requested district court to rule on undecided bases for habeas relief satisfied Rule 59 (e).) The federal courts are very liberal in construing the scope of "appropriate" 59(e) motions. *See, e.g., Herzog Contracting Corp. v. McGowen* [C]*orp.*, 976 F. 2d 1062 (1992); *Rosen v. Rucker*, 905 F. 2d 702 (1990); *Osterneck v. E.T. Barwick Industries, Inc.*, 825 F. 2d 1521 (11th Cir. 1987), aff'd 489 U.S. 169 (1989).

Indeed, under federal precedents, a Rule 59(e) motion need not include any new material, and can merely rehash arguments and claims made at trial, and it will still suffice under the rule to toll the appellate clock. *See Clipper Express,* supra, and Argument 4 above at pp. 15-16. Thus, there are profound mixed messages sent by the South Carolina courts here. Even *Quality Trailer* (which, as noted above, cannot be applied retroactively in any event) did not purport to back away from *Gardiner*'s commitment to follow federal law, and yet it reached a result inconsistent with the way the federal rules have been interpreted. This inconsistency in leading IGT and other litigants to the conclusion that federal precedent will be followed, then changing that view without fair notice, is a violation of [the] due process clause and should be rectified.

6. IGT'S RIGHT TO EQUAL PROTECTION HAS BEEN VIOLATED.

Like the Due Process clause, the Fourteenth Amendment's Equal Protection clause also limits states in the way they structure their appellate processes. Equal Protection requires that a state's classifications and decisions be "rationally related to a legitimate state interest," *see Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988). Here, the actions of the Court of Appeals violate this standard because there is no "rational" reason why the rule applied to IGT was not applied to other litigants. To the extent that the IGT ruling changed the law (and to the extent that it could be applied retroactively, see above) there is still no rational reason why the test adopted in IGT's case has been applied to some litigants (i.e., *Elam*), but not applied to other litigants (i.e., *Mullis*).

Additionally, this Court's grant of writ of certiorari in *Elam* further underscores the denial of equal protection as to IGT. In *Elam*, the Court of Appeals, *sua sponte*, dismissed the appeal because the appellant made a Rule 59(e) motion that the Court, citing *Quality Trailer*, deemed a successive motion under Rule 59(a) or Rule 50(b). The appellant argued that due to the wording used by the trial judge in denying its initial post-trial motions, it was unclear whether the judge has ruled on all issues, or he had so clearly based his decision on a misunderstanding of the testimony given that a motion to reconsider was warranted. In fact, the trial judge even amended his order in response to the Rule 59(e) motion. In spite of this, the Court of Appeals held that the appeal was untimely.

If anything, IGT's Rule 59(e) motion was more in line with a "proper" 59(e) motion under the *Quality Trailer*

decision than the *Elam* motion, as IGT never asked the trial judge to reconsider his original order. Nevertheless, the issues dealt with in reaching the decision to dismiss the *Elam* appeal were clearly *identical* to the issues cited by Collins and the Court of Appeals in dismissing IGT's appeal; that is, a motion purportedly brought under Rule 59(e) that the *Quality Trailer* decision holds as improper.

As *Elam* raises the same issues raised by IGT, there is no reason for the Supreme Court to deny certiorari to IGT. Either certiorari should be granted and the cases consolidated, or IGT's petition should be "held" pending the resolution of the *Elam* case. The United States Supreme Court has a practice of "holding" cases that raise the same issue as a case on which cert. has already been granted. As various Justices of the Supreme Court have opined, this "hold" practice is driven by concerns about horizontal equality. As Justice William Brennan explained, holding cases is required by the very essence of equal protection:

> The Court's hold policy represents the conviction that like cases must be treated alike. The principle is apparent: whether an individual obtains relief should not turn on the fortuity of whether his papers were the first, the second, or the tenth to reach the Court. [To deny a hold when a second cases raises the same issue as the first one] is to divide litigants arbitrarily . . . on the basis of what amounts to little more than a footrace. It is to reject those first principles of justice that ultimately define a system of law: the principles of uniform application of rules, of consistency, of evenhandedness, of fairness.

Straight v. Wainwright, 476 U.S. 1132, 1134 (dissenting opinion) (1986). The requirement of "judicial equal protection" in holding cases makes sense. As Justice

Brennan observed, to deny a hold in a case presenting the same question is "arbitrary" (and thus unconstitutional), and it undermines the uniform application of the rule of law.

Having decided the issue raised in the *Elam* petition is ripe for review, there is simply no rational reason not to give IGT the benefit of whatever *Elam* holds. An arbitrary decision not to treat IGT equally to others, including *Elam*, violates both federal equal protection and federal due process. On this basis, IGT requests that either this Court grant certiorari, or hold this petition in abeyance until *Elam* is decided.

CONCLUSION

Wherefore, based upon all the foregoing reasons, IGT prays that this Court issue its Writ of Certiorari to the Court of Appeals, consider these issues, and reverse the decision of the Court of Appeals.

June ____, 2003

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THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

John L. Breeden, Jr., Circuit Court Judge

Case No. 94-CP-26-3266

Collins Music Co., Inc. ..... Respondent

v.

IGT a/k/a IGT-North America ..... Appellant

PETITION

Petitioner IGT a/k/a IGT-North America (hereinafter "IGT"), by and through the undersigned counsel, hereby petitions this Court to delay and withhold remittitur of this case and to assemble the necessary panel quorum of this Court to rule on IGT's Petition for a Rehearing, previously filed. Alternatively, IGT petitions this Court to vacate its Order dismissing IGT's Appeal and to assemble a new panel quorum to rehear Respondent Collins' Motion to Dismiss IGT's Appeal.

This Court has not ruled upon the petition for rehearing, and the Supreme Court, to which this case was certified, ruled only that Petitioner's Petition for Rehearing *en banc* was deemed denied. Therefore, Petitioner, IGT, has not received a ruling on its Petition as provided in SCACR 221. Until there is either a ruling by this Court on IGT's Petition for a Rehearing, or, alternatively, the

vacation of this Court's Order dismissing the appeal and a new hearing of Respondent's motion, there is no final judgment under SCACR 226(c) for remittitur. If remittitur occurs without a ruling on IGT's outstanding Petition for Rehearing, IGT will be denied equal protection and due process under the South Carolina Appellate Court Rules and the applicable law of South Carolina, all in violation of the equal protection and due process clauses of the South Carolina Constitution and the Constitution of the United States of America, and there will not be a final and valid judgment in this state.

Respectfully submitted,

April 29, 2003

/s/ James F. Flanagan

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM HORRY COUNTY
COURT OF COMMON PLEAS
John L. Breeden, Jr., Circuit Court Judge

Case No. 94-CP-26-3266

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v.

IGT a/k/a IGT-North America, ... Appellant

PROOF OF SERVICE

I certify that the Appellant's Petition has been served on counsel for the Respondent by depositing a copy in the United States Mail, postage prepaid, on April 29, 2003, addressed to:

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Quality Trailer Products, Inc., Respondent,

v.

CSL Equipment Company, Inc. and I Corp., Defendants,

of which I Corp. is Appellant.

Appeal From York County
John C. Hayes, III, Circuit Court Judge

Opinion No. 25435
Heard February 20, 2002 - Filed April 1, 2002

DISMISSED

Charles E. Carpenter, Jr., S. Elizabeth Brosnan, and Alexander H. Twedt, of Richardson, Plowden, Carpenter & Robinson, P.A., of Columbia, for appellant.

W. Mark White and W. Chaplin Spencer, Jr., of Spencer & Spencer, P.A., of Rock Hill, for respondent.

James B. Richardson, Jr., of Richardson & Birdsong, of Columbia, for Amicus Curiae, *Pro se.*

PER CURIAM: Appellant I Corp. appeals the trial court's denial of its motion for judgment notwithstanding the verdict ("JNOV") and its motion for new trial following

a jury verdict for Respondent Quality Trailer Products, Inc. ("QTP"). We dismiss the appeal as untimely.

FACTS

QTP brought suit against CSL Equipment Company, Inc. ("CSL") and I Corp. QTP asserted causes of action against I Corp. for breach of the South Carolina Bulk Transfers Act ("The Act"),[1] promissory estoppel, and successor liability. The trial court granted I Corp.'s motion for directed verdict on QTP's claim arising under the Act, and submitted the other two theories to the jury. In its general verdict, the jury found I Corp. liable to QTP. In addition, the trial court awarded QTP prejudgment interest.

Following the jury verdict, I Corp. made timely post trial motions for JNOV, and for a new trial (collectively, "first motion"). By order dated December 20, 1999, and filed December 21, 1999, the trial court denied the first motion.

On December 30, 1999, I Corp. filed a motion captioned as a motion to "Alter, Amend or Reconsider Judgment and Findings Denying Defendant's Motion for Judgment Notwithstanding the Verdict and Motion for New Trial" ("second motion"). The caption of the second motion indicated it was made pursuant to "S.C.R.Civ.P. 52, 59, and 60." In fact, the second motion was almost a duplicate of the first motion. The only changes I Corp.

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[1] S.C. Code Ann. §§ 36-6-101 through 111 (1976). The legislature repealed the Act *in toto* effective July 1, 2001.

made were to caption the second motion differently, and to change the relief sought to coincide with the second motion's caption. The trial court recognized that the second motion was, in substance, identical to the first motion, and by order dated February 16, 2000, and filed February 21, 2000, denied the second motion. I Corp. filed its notice of appeal on March 17, 2000.

ISSUE

Did I Corp.'s second motion toll the time period for filing an appeal?

ANALYSIS

Rule 203(b)(1), SCACR, provides that a notice of appeal from a judgment of the Court of Common Pleas

> shall be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment. When a timely motion for judgment n.o.v. (Rule 50, SCRCP), motion to alter or amend the judgment (Rules 52 and 59, SCRCP), or a motion for a new trial (Rule 59, SCRCP) has been made, the time for appeal for all parties shall be stayed and shall run from receipt of written notice of entry of the order granting or denying such motion.

In *Coward Hund Const. Co., Inc. v. Ball Corp.*, 336 S.C. 1, 518 S.E.2d 56 (Ct. App. 1999), the Court of Appeals held that a successive Rule 59(e), SCRCP, motion, following the denial of a similar motion, did not toll the time for filing appeal, where the court's ruling on the first such motion did not change its ruling at trial. The Court of Appeals noted that Coward Hund did not challenge any

new ruling in its second Rule 59 motion. The Court of Appeals agreed with the prevailing federal rule that "a second motion for reconsideration is appropriate only if it challenges something that was altered from the original judgment as a result of the initial motion for reconsideration." *Coward Hund Const. Co., Inc.,* at 3, 518 S.E.2d at 58.

Here, the question is whether the filing of a successive motion, raising issues already raised to and ruled upon by the trial judge, stays the time to appeal. We hold that it does not.

Although the caption identifies Rule 52, SCRCP, as one basis for the motion, that rule simply does not apply here. Rule 52, SCRCP, provides that:

> In all actions tried upon the facts *without a jury or with an advisory jury,* the court shall find the facts specially and state separately its conclusions of law thereon .... Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or *any other motion except as provided in Rule 41(b).*

(Emphasis supplied). Rule 41(b), SCRCP, does not apply to this case.[2] Since this was an action tried by a jury, Rule 52, SCRCP, does not apply.

Despite its caption, I Corp.'s second motion was not a Rule 59(e), SCRCP, motion. The motion did not ask the

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[2] Rule 41(b), SCRCP, applies to cases tried without a jury. The rule requires the judge, as trier of fact, to make specific findings as provided in Rule 52(a), SCRCP, where the judge renders judgment on the merits against the plaintiff.

trial court to rule on an issue presented but not ruled upon in any previous motion. In its order denying the second motion, the trial court remarked that "the [second] Motion is an exact compilation of the prior motion for judgment notwithstanding the verdict and motion for new trial with a few procedural alterations. In sum, the Motion seeks the reversal of the Order, but provides no additional assertion of fact or argument of law." We agree with the trial court's interpretation of the second motion.

Notwithstanding its caption, the second motion did not ask for relief available pursuant to Rule 60, SCRCP. Rule 60 allows a motion for relief from the judgment based on a number of specific grounds, including clerical mistake, other mistake, inadvertence, excusable neglect, newly discovered evidence, and fraud. The second motion raised none of these grounds.

We agree with the rationale of *Coward Hund* and hold that **successive** new trial motions or motions for JNOV do not toll the time for serving notice of appeal. The time for filing appeal is not extended by submitting the same motion under a different caption.[3] *See Mickle v. Blackmon,* 255 S.C. 136, 140, 177 S.E.2d 548, 549 (1970) (treating motion based on its "substance and effect" rather than how it is captioned by movant). *See also Sears v. Sears,* 422 N.E.2d 610 (Ill. 1981) (a successive motion that was little more than a slightly lengthened redraft of the first motion

[3] We do not intend to suggest that I Corp.'s initial JNOV and new trial motions were not proper or did not toll the time for serving the notice of appeal. Clearly they did. *See* Rule 203(b)(1), SCACR. However, the issue is whether the time for serving notice of appeal is tolled by subsequently filing the same motion under a different caption.

was improper and did not extend the time for filing appeal); *Boughton v. McAllister,* 576 N.W.2d 94 (Iowa 1998) (a party should not be allowed to extend the time for appeal indefinitely by filing successive motions that address the same issue).

I Corp. argues on appeal that the second motion was required to preserve issues raised, but not ruled upon, in the trial court's order denying JNOV and new trial. The second motion did not, however, identify a single issue raised but not ruled upon - it merely recites, verbatim, the arguments made in the earlier motions. The trial court's denial of the JNOV and new trial motions was a ruling on all issues raised, and preserved for appellate review all issues raised therein.

CONCLUSION

We find that I Corp.'s second motion literally recites the arguments previously raised and previously ruled upon by the trial court in I Corp.'s first motion. The second motion was not, despite its caption, an appropriate Rule 59(e) motion. It was simply a successive motion for JNOV and new trial, and thus did not toll the time for serving the notice of appeal. I Corp. did not serve its notice of intent to appeal within the time prescribed in Rule 203, SCACR. We therefore dismiss the appeal as untimely. *See Mears v. Mears,* 287 S.C. 168, 337 S.E.2d 206 (1985) (timely service of the notice of intent to appeal is a jurisdictional requirement, and this Court has no authority to extend or expand the time in which the notice of intent to appeal must be served).

MOORE, A.C.J., WALLER, BURNETT and PLEICONES, JJ., and Acting Justice George T. Gregory, Jr., concur.

[LOGO]

The South Carolina Court of Appeals

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January 27, 2003

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RE: Collins Music Co., Inc. v. IGT

Dear Mr. Boston:

This letter confirms our telephone conversation of today. You asked about any disqualifications of the original panel members (Judges Goolsby, Connor, and Anderson) who issued this court's order.

After conferring with Mr. Richstad, I can inform you that Judge Goolsby became disqualified after the panel order was issued.

By copy of this letter, I am advising all counsel of record of this information.

Very truly yours,
/s/ V. Claire Allen
DEPUTY CLERK

cc: James F. Flanagan, Esquire
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Wilson S. Sheldon, Esquire
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Scott Michael Mongillo, Esquire,
Hon. Daniel E. Shearouse, Clerk of the
South Carolina Supreme Court

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ALLENDALE COUNTY
Court of Common Pleas
Daniel E. Martin, Sr., Circuit Court Judge

Case No. 99-CP-03-008

Hattie Rose Elam, Respondent,

v.

South Carolina Department of Transportation, Petitioner

PETITION FOR A WRIT OF CERTIORARI

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INDEX

Certificate of Counsel 1

Questions Presented 1

Statement of the Case 1

Arguments:

1. Did the Court of Appeals err in holding that Petitioner SCDOT's Rule 59(e) motion did not toll the time for appeal when that motion followed an oral denial of petitioner's JNOV motion which could have been based on either of two independent grounds, and well established precedent required the filing of a [R]ule 59(e) motion so that the trial court rule on each ground to preserve each for appeal? ... 4

2. Did the Court of Appeals err in extending the principle of *Quality Trailer Products* to Petitioner SCDOT's Rule 59(e) motion by finding that motion repeated arguments made in the JNOV motion, when such arguments must be repeated if an appellant desires to preserve an argument previously made but not ruled upon? 8

3. Did the Court of Appeals err when, contrary to well established precedent that implicit rulings do not preserve error, the Court of Appeals held that the trial court's oral denial of Petitioner SCDOT's JNOV motion preserved all of petitioner's arguments on notice, when the denial was an implicit ruling because it could have rested on either of two independent grounds and the expressed rationale for the denial was internally inconsistent with the charge to the jury? 9

4. Did the Court of Appeals err in holding that Petitioner SCDOT's Rule 59(e) motion did not toll the time for appeal when the trial court, in denying SCDOT's JNOV motion, apparently reversed its view of the law on

which it instructed the jury and for the first time ruled that pre-repair notice was sufficient, thereby making the Rule 59(e) motion the first opportunity to challenge this new ruling? 11

5. Did the Court of Appeals err in holding that Petitioner SCDOT's Rule 59(e) motion did not toll the time for appeal when the motion complied with the precedent at the time it was filed, the trial court and opposing counsel treated the motion as proper and it served the purpose established in case law because the trial court provided a ruling on each point and preserved each argument for appeal? 12

6. Did the [C]ourt of Appeals err by so expanding the holding of *Quality Trailer Products* and its interpretation of the use of Rule 59(e) for error preservation, that lawyers and parties are now uncertain when Rule 59(e) motions are required to preserve error and when such motions may be held successive and not toll the time for appeal? 13

Conclusion 15

CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on September 18, 2002.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that Petitioner SCDOT's Rule 59(e) motion did not toll the time for appeal

when that motion followed an oral denial of petitioner's JNOV motion which could have been based on either of two independent grounds, and well established precedent required the filing of a Rule 59(e) motion so that the trial court rule on each ground to preserve each for appeal?

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STATEMENT OF THE CASE

This personal injury lawsuit was commenced by the service of Respondent, Hattie Rose Elam's Summons and Complaint, which were filed on January 19, 1999, seeking actual damages for personal injury and property damage sustained in a one-car collision on Highway 125 in Allendale County on Sunday March 8, 1998. Petitioner, South Carolina Department of Transportation (SCDOT) answered on February 18, 1999, invoking Tort Claims Act immunities for temporary or natural conditions due to weather, Elam's sole negligence and comparative negligence. Elam filed an amended Complaint, to include allegations of scarring, on July 30, 1999. SCDOT answered on August 10, 1999. Elam later filed a second amended complaint to add property damage for her vehicle on September 29, 2000. Prior to trial, SCDOT sought to amend its answer, so as to assert the Tort Claims Act immunity for design, which was denied.

The case was tried before a jury, which rendered a verdict on January 10, 2001, for Elam in the amount of two hundred fifty thousand ($250,000.00) dollars. SCDOT moved for directed verdict at the close of Elam's case and again at the close of all the evidence. At the conclusion of

trial, SCDOT moved before the trial court for a judgment notwithstanding the verdict, and for a new trial absolute and in the alternative, for a new trial *nisi remittitur*. All motions were denied, and SCDOT timely moved for reconsideration under Rule 59(e), which was also denied by the trial court's order of April 6, 2001. SCDOT's Notice of Appeal was served on counsel for Elam on April 28, 2001, and filed May 2, 2001. At the request of the Court of Appeals, counsel for both parties briefed the question of whether or not this appeal was untimely, in light of this Court's decision in *Quality Trailer Products*, 349 S.C. 216, 562 S.E.2d 615 (2002). On July 25, 2002, the Court of Appeals issued its Order dismissing the appeal as untimely. On August 8, 2002, Petitioner filed its Petition for Rehearing, which was denied by order of the Court of Appeals on September 18, 2002.

ARGUMENT

1. The Court of Appeals erred in holding that Petitioner SCDOT's Rule 59(e) motion did not toll the time for appeal because that motion followed an oral denial of petitioner's JNOV motion which could have been based on either of two independent grounds, and well established precedent required the filing of a Rule 59(e) motion so that the trial court rule on each ground to preserve each for appeal.

This Court and the Court of Appeals require that, in order for a losing party in the trial court to present an argument on appeal, the appellant must preserve the issue by first presenting it to the trial court and have the trial court rule upon all grounds that it wishes preserved for appeal. "The losing party must first try to convince the

lower court it . . . has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred". *I'On L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724-725 (2000). A specific ruling on each ground is required. "An issue is not preserved for appellate review where the trial court did not explicitly rule on the appellant's argument and the appellant made no Rule 59(e) motion to alter of amend the judgment". *Noisette v. Ismail*, 304 S.C. 56, 403 S.E.2d 122 (1991).

Implicit rulings are ineffective for error preservation purposes. In *Walker v. The Bluffs Apartments*, 324 S.C. 350, 477 S.E.2d 472 (Ct. App. 1996), the appellant (who had not made a Rule 59(e) motion), sought, on appeal, to argue the common knowledge exception in connection with expert testimony. Concluding that the issue had not been preserved, despite having been presented by argument to the trial court, the Court of Appeals said: "The record shows that Walker argued the common knowledge exception in opposition to Narmour's motion for summary judgment. The trial court ruled that Walker's expert was not qualified, but did not explicitly rule on Walker's argument for application of the common knowledge exception." *Walker v. The Bluffs Apartments*, at 474. This reasoning is directly applicable in the case at bar. SCDOT argued both the existence of evidence of notice and the legal standard for notice, but the trial court's denial gave no indication of which argument drove his decision.

In *Van Blarcum v. City of North Myrtle Beach*, the appellant (who had not made a Rule 59(e) motion), asserted that the Master had implicitly addressed the particular question which was on appeal. This Court rejected the appellant's argument, noting that "an implicit

ruling will not suffice". *Van Blarcum v. City of North Myrtle Beach*, at 490.

Whenever an order presents these problems the courts have specifically directed appellants to file a Rule 59 motion to provide the trial court an opportunity to rule upon and issue and correct the error.

In the case at bar, at the conclusion of trial, counsel for SCDOT moved for JNOV, asserting a lack of evidence of notice to SCDOT, and citing *Summer v. Carpenter*, 328 S.C. 36, 492 S.E.2d 55 (1997) for its reasoning on "interrupted notice". Elam's counsel responded that there was notice on the part of the Department, (R. p. 426, l. 16 – p. 427, l. 8), after which the trial court referred to the testimony of Sergeant King, and his having reported the condition of the road to SCDOT, and ruled: "The Court is of the opinion that the Department and the State has been placed on notice. And the question as to whether or not the defendant was negligent under these circumstances was a matter to be determined by the Constitutionally empaneled triers of the facts, the jury. The jury had made that determination. Your motion is respectfully denied." (R. p. 427, l. 16-24).

Counsel for SCDOT persisted in its efforts to focus on the question of "interrupted notice", asserting that "there's no evidence in the record of any notice or any indication of a problem, or that the repairs were inadequate, subsequent to, that is, after the time that the Highway Department completed its work on February 10th and prior to the events of March 8th, 1998". (R. p. 428, l. 8-14). Elam's counsel responded that "[t]he evidence shows that, under their own witness, Mr. Jones, he testified that when he was out there, that they had a continuing problem from

December, January, and February". (R. p. 429, l. 2-5). The trial court ruled simply "[y]our motion is denied and still stands." (R. p. 429, l. 15-16). The court gave no basis or reasoning for the denial following argument on the issues of "interrupted notice".

Thus, the trial judge could have based his ruling on either of two reasons: First, the trial judge's oral ruling denying the motion for JNOV could mean that, as a matter of law, the remedial measures performed on February 10, 1998 did not break the chain of notice which existed prior to repairs, thereby rejecting the *Summer v. Carpenter* interrupted notice. If this was the court's ruling, which is implied by its reliance on Trooper King's testimony of pre-repair notice only, then its decision was inconsistent with its charge on interrupted notice and was a significant change in its view of the law of the case, because the court was now holding that any notice, before or after the repairs, was sufficient. This ruling would be a new issue, raised for the first time in the trial court's denial of the JNOV motion, and at odds with the court's instruction to the jury, and in and of itself, justify a Rule 59(e) motion to elicit the basis of the ruling and to preserve the issue for appeal.

Second, the trial judge's order could be interpreted to be ruling that even under the theory of interrupted notice of *Summer v. Carpenter*, charged by the court, there was evidence in the record to support a finding that DOT has post-repair notice of the condition after February 10, 1998. If this was the court's ruling, and the court relied only on Trooper King's testimony about conditions before the repairs cited during his oral ruling, then the ruling was not supported by Trooper King's testimony, and in the view of SCDOT, any other evidence in the record.

The transcript of the courts ruling on the post-trial motions may reasonably be read as saying that the evidence was sufficient to support the verdict. This would not resolve SCDOT's concern or provide a specific ruling on each branch of the notice issue, the need for which was manifested by the trial court's confusing denial. The proper resolution of the sufficiency of the evidence question on JNOV, a fact question, depended upon the applicable legal standard for notice, and whether the legal standard was satisfied by pre-repair notice, as provided by Trooper King, or post-repair notice as charged to the jury under *Summer v. Carpenter*. A motion under Rule 59(e) was SCDOT's first opportunity to challenge the trial court's notice ruling.

It is undeniable that the trial court "ruled" on SCDOT's JNOV motion but, there is no way to discern from the trial transcript which of these two equally plausible rationales underlie the "ruling". At best, the denial is ambiguous; more appropriately, it is internally inconsistent. "When an order is internally inconsistent, that inconsistency must be raised to the trial court by way of post-trial motion before it is preserved for appellate review. *Parker v. Shecut*, 340 S.C. 460, 531 S.E.2d. 546 (Ct. App., 2000), *reversed on other grounds*, 349 S.C. 226, 562 S.E.2d 620 (2002).

SCDOT desired to preserve both the legal and factual issues for appeal. If it had not filed the Rule 59 motion it would not have been able to challenge the court's shift in legal rationale because there was no specific ruling that the trial court had rejected the *Summer v. Carpenter* standard. Likewise, SCDOT also desired to preserve the factual argument that under the *Summer v. Carpenter* standard, there was no evidence of post-repair notice.

Under caselaw which existed at the time of trial, the only way for SCDOT to be able to appeal from the trial court was to first preserve the issues by making a motion under Rule 59(e).

2. The Court of Appeals erred in extending the principle of Quality Trailers to Petitioner SCDOT's Rule 59(e) motion on the ground that motion repeated arguments made in the [JNOV] motion when such arguments must be repeated if appellant desires to preserve an argument previously made but not ruled upon.

SCDOT does not challenge the central holding of *Quality Trailer Products, Inc. v. CSL Equipment, Co.*, 349 S.C. 216, 562 S.E.2d 615 (2002) – that a duplicative and successive motion [ ] does not toll the time for appeal. Petitioner maintains that the Court of Appeals improperly applied that principle in the present case. In its order dismissing the appeal, the Court of Appeals described the holding of *Quality Trailer Products*:

> [W]here the appellant's Rule 59(e) motion merely reiterated, with a few procedural alterations, the grounds previously raised and ruled upon in its prior motion for JNOV and new trial, its Rule 59(e) motion amounted to a successive motion JNOV and new trial and did not toll the time for serving the notice of appeal.

(Order, p. 2).

The Court of Appeals ruled that SCOT's [sic] 59(e) motion was not entitled to tolling, noting that it "mirrored all of the grounds raised at trial in its motions for JNOV and new trial" (Order, p. 2); that SCDOT "concedes its Rule 59(e) motion reiterated the issues previously argued

in its post-trial motions for JNOV and new trial" (Order, p. 2); and that SCDOT acknowledges "it was clear the judge denied the motion for JNOV" (Order, p. 3).

The Court of Appeals erred in applying *Quality Trailer Products* to this case for two reasons. First, the court's reliance on the similarity of arguments in the JNOV motion and the Rule 59 motion is not a true indicator of whether a motion is successive. In fact, a proper motion to preserve an argument presented but not ruled upon must necessarily repeat the arguments previously made because new arguments cannot be made for the first time in a post trial motion. Moreover, the purpose of the Rule 59 motion is to provide an opportunity for the court to correct its error, and hence it was necessary to repeat the arguments. The proper focus for determining whether a motion is properly made for error preservation purposes is not whether the same arguments are made, but whether the order of the court sufficiently ruled upon each of the arguments presented. See, *Noisette v. Ismail*, *Van Blarcum v. City of North Myrtle Beach*, and *Walker v. The Bluffs Apartments*.

3. The Court of Appeals erred when, contrary to well established precedent that implicit rulings do not preserve error, the Court of Appeals held that the trial court's oral denial of Petitioner SCDOT's JNOV motion preserved all of petitioner's arguments on notice when the denial was an implicit ruling on each ground because the denial could have rested on either of two independent grounds and the expressed rationale for the denial was internally inconsistent with the charge to the jury.

The Court of [A]ppeals also erred in holding that the trial court had clearly ruled on all of SCDOT's arguments

by virtue of the trial court having denied its JNOV motion. There is no dispute that the court did not grant the JNOV motion. However, the critical question is whether that denial was a specific ruling on each argument made because the issue on appeal would be whether all arguments were preserved, not whether the verdict had been reversed. See, *Noisette v. Ismail, Van Blarcum v. City of North Myrtle Beach*, and *Walker v. The Bluffs Apartments*. As discussed above, the denial of the JNOV can be sustained on either (a) that *Summer v. Carpenter* is a correct statement of the law and that evidence of post-repair notice was provided or (b) that *Summer v. Carpenter* is not a correct statement of the law and any notice was sufficient.

Petitioner maintains that the ambiguity or inconsistency was sufficient to require a Rule 59 motion to obtain a specific ruling on the issue as required by long standing precedent. The Court of Appeals however seems to hold that the denial, as an implied ruling on each issue, was sufficient, citing *Bailey v. Segars*, 346 S.C. 359, 550 S.E.2d 910 (Ct. App. 2001). To the extent that the Court of Appeal[s] holds that an implicit ruling is sufficient, that holding is inconsistent with many other holdings of this Court that implicit rulings do not preserve arguments for appeal. See, *Noisette v. Ismail, Van Blarcurm v. City of North Myrtle Beach*, and *Walker v. The Bluffs Apartments*. At the very least this holding generates confusion and uncertainty in the law of post trial motions and error preservation and exposes counsel to the dilemma of whether to make a Rule 59(e) motion for error preservation and risk an untimely appeal, or refrain from filing the motion at the risk of the appellate court concluding that the argument or error was not preserved.

4. The Court of Appeals erred in holding that Petitioner SCDOT's Rule 59(e) motion did not toll the time for appeal when the trial court, in denying SCDOT's JNOV motion, apparently reversed its view of the law on which it instructed the jury and for the first time ruled that pre-repair notice was sufficient, thereby making the Rule 59(e) motion the first opportunity to challenge this new ruling.

The Court of Appeals held in *Coward Hund Const. Co. v. Ball Corp.*, 336 S.C. 1, 518 S.E.2d 56 (Ct. App. 1999), that a Rule 59(e) motion is proper if it challenges something that was altered by the previous motion. Here, the trial court had instructed the jury on interrupted notice as provided in *Summer v. Carpenter*. (R. p. 417). The Rule 59(e) motion was directly challenging the trial court's denial of the JNOV. While the trial court's ruling on the JNOV motion did not expressly reject *Summer v Carpenter*, its ruling on the question was ambiguous because of the evidence relied upon by the court in denying JNOV and the trial court was apparently rejecting the law which it had charged[.]

SCDOT's argument on *Summer v. Carpenter* in the JNOV motion had not sought a ruling on that point because at that time of the JNOV motion the court had accepted it as the correct statement of the law on notice because it had charged the jury to that effect. That case was cited to lay the legal foundation for the argument that there was no evidence of post-repair notice. However, when the trial court denied the JNOV motion citing only pre-repair notice the court, *for the first time*, was apparently rejecting SCDOT's legal position on notice. At this point a Rule 59 motion was necessary to now argue that *Summer v. Carpenter* was the correct statement of the law, and to provide the trial court the opportunity of correcting

its error made in denying the JNOV and to rule consistently with its prior charge to the jury there must be post-repair evidence of notice.

5. The Court of Appeals erred in holding that Petitioner SCDOT's Rule 59(e) motion did not toll the time for appeal when the motion complied with the precedent at the time it was filed, the trial court and opposing counsel treated the motion as proper and it served the purpose established in case law because the trial court then provided a ruling on each point and preserved each argument for appeal.

Finally, the Court of Appeals faults SCDOT's Rule 59(e) motion because it "nowhere asserts or alleges the trial court failed to rule on any of the previously-raised grounds;" citing *Quality Trailer Products*. SCDOT filed its [R]ule 59(e) motion on January 19, 2001, some 14 months before *Quality Trailer Products* was decided. Consequently the Court of Appeals was applying a standard that SCDOT could not reasonably have known at the time it made its motion, resulting in a fundamentally unfair result. Moreover, page 1 of the Rule 59(e) motion specifically points to the trial court's misapplication of the legal standard for notice in ruling on the JNOV motion so that the court and counsel were well aware of the issues to be ruled upon.

The most revealing evidence that SCDOT's Rule 59(e) motion was proper and appropriate, when made in January 2001, is the response of the trial court and opposing counsel. The trial court received memoranda and heard oral argument and then issued a detailed ruling. That Order discussed the testimony and evidence of pre-repair notice over 3½ pages and concluded that, "given the

aforementioned testimony . . . the Court is of the opinion that there was evidence, direct and circumstantial, justifying submission of the case to the jury". (R. p. 011). (Emphasis added).

Then, even though he had charged "interrupted notice" of *Summer v. Carpenter*, the trial judge referred to SCDOT's 59(e) argument on interruption of notice and stated, "[T]his Court notes that the language in that case to which Defendant refers is dictum and does not represent the applicable law in this State". (R. p. 011). Thus, only when the trial judge denied the Rule 59(e) motion did he finally and clearly rule that he did not accept the validity of *Summer v. Carpenter's* "interruption of notice."

Thus, unlike *Quality Trailer Products*, where the trial court immediately recognized the motion as duplicative, the court properly treated it as raising unresolved issues and specifically ruled on those presented. Opposing counsel never objected to the Rule 59(e) motion as successive. The issue was raised *sua sponte* by the Court of Appeals after the case had been pending there for more than 13 months, and only after *Quality Trailer Products* had been decided.

6. The Court of Appeals erred by so expanding the holding of *Quality Trailer Products* and its interpretation of the use of Rule 59(e) for error preservation that lawyers and parties are now uncertain when Rule 59(e) motions are required to preserve error and when such motions may be held successive and not toll the time for noticing an appeal.

Through *Quality Trailer Products*, this Court for the first time, imposed the penalty of not allowing the benefit

of tolling of the time for filing notice of appeal, based upon the appellant's 59(e) motion raising issues already raised to and ruled upon by the trial judge. Since issuance of that ruling, the Court of Appeals' efforts to apply the holding in at least two cases have brought a dramatic and troublesome change to post-trial practice in South Carolina.

Prior to *Quality Trailer Products*, the trial lawyer who failed to make a motion to reconsider under Rule 59(e) risked dismissal of his appeal for failure to satisfy the requirement that the matter first be raised to and ruled upon by the trial court. To this risk of dismissal for failure to make a 59(e) motion, there is now added the risk of dismissal for making a 59(e) motion which the Court determines is a successive reiteration of JNOV or new trial motions. Unfortunately, the basis for making this choice is rarely clear and knowable in advance to the lawyer who must make the decision.

As in the case at bar, it is not always easy, nor possible, to determine whether or not the trial court's ruling on an issue presented in JNOV or new trial motions is a sufficient ruling for the issue preservation requirement of "raised to and ruled upon". The determination is further confounded where, as in this case, the trial court's ruling on JNOV is internally inconsistent with the court's own prior ruling in the case, presenting the issue to the lawyer for the first time in the JNOV ruling. The determination is certainly not so simple as observing that the trial court has denied a motion.

The Court of Appeals' application of *Quality Trailer Products* has extended that holding so that the need for discerning which issues have been explicitly ruled upon

and which issues have not, poses a nearly impossible conundrum for trial lawyers.

CONCLUSION

Wherefore, based upon all the foregoing reasons, Petitioner prays that this Court issue its Writ of Certiorari to the South Carolina Court of Appeals, to consider the questions presented, and to reverse the decision of the Court of Appeals.

/s/ Pete Kulmala
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October 18, 2002
Barnwell, S.C.

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ALLENDALE COUNTY
Court of Common Pleas
Daniel E. Martin, Sr., Circuit Court Judge

Case No. 99-CP-03-008

Hattie Rose Elam, Respondent,

v.

South Carolina Department of
Transportation, Petitioner,

PROOF OF SERVICE

I certify that I have served the Petition for Writ of Certiorari on Hattie Rose Elam by depositing a copy of it in the United States Mail, postage prepaid, on October 18, 2002, addressed to her attorney of record, H. Woodrow Gooding, Jr. and Mark B. Tinsley, Esquires, PO Box 1000, Allendale, South Carolina 29810.

/s/ Pete Kulmala
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Attorneys for Appellant

October 18, 2002

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ALLENDALE COUNTY
Court of Common Pleas
Daniel E. Martin, Sr., Circuit Court Judge

Case No. 99-CP-03-008

Hattie Rose Elam, Respondent,

v.

South Carolina Department
of Transportation, Petitioner.

PETITIONER'S REPLY TO RESPONDENT'S RETURN

I. Respondent's Return Further Emphasizes the Need for The Supreme Court to Grant the Petition for Certiorari and Resolve the Significant Issues regarding Error Preservation and Post-Trial Motions.

Respondent's Return to the Petition for Certiorari merely reasserts arguments previously made and further emphasizes the need for review and clarification on error preservation and post-trial motions by its concluding argument. There, Respondent implicitly recognized that counsel are faced with determining whether an issue has been preserved by suggesting that in those situations counsel file a Rule 59(e) motion and then file a timely appeal. Respondent's suggestion necessarily means that the issue is not resolved by the trial court before the appeal is filed and inevitably leads to cases being remanded to the trial court for a ruling before returning to

the [C]ourt of Appeals, with accompanying delay, expense, and diversion of judicial resources entailed in that procedure.

It should now be evident that the simple statement from *Quality Trailer Products*, cited by the Court of Appeals, that "where the appellant's Rule 59(e) motion merely reiterated with a few procedural alterations the grounds previously raised and ruled upon in its prior motion for JNOV and new trial, its Rule 59(e) motion amounted to a successive motion for JNOV and new trial and did not toll the time for serving notice of appeal" is not susceptible of ready application without further elucidation from this Court. It is of utmost importance to litigants and counsel as well, that the holding of *Quality Trailer Products* be placed in context with the kinds of issues raised in this case, involving implicit rulings internal inconsistencies, and the apparent conflict between the need for a sufficient ruling for issue preservation versus the timeliness of filing notice of appeal.

This Court has now accepted review of another case (*Collins Music Co., Inc. v. IGT*) involving a number of the same issues as this case, with factual differences regarding the presentation of post-trial motions. Petitioner respectfully urges [t]his Court to grant Certiorari and to consider both cases in consolidation, so that all issues raised may be reviewed comprehensively and a clarifying ruling may be issued.

II. Petitioner SCDOT Properly Presented All Arguments to the Court of Appeals.

In her return to the Petition for Certiorari, Respondent suggests that three of Petitioner SCDOT's Questions

Presented were not raised in either Petitioner's initial argument to the Court of Appeals or SCDOT's Petition for Rehearing. That suggestion is simply incorrect and without any basis.

In effect, Respondent is asserting that the applicability to this case of the Supreme Court opinion that caused the Court of Appeals to raise, *sua sponte*, the issue of the timeliness of SCDOT's appeal, and the arguments based on two important facts which distinguish this case from *Quality Trailer Products, Inc. v. CSL Equipment Co.*, 349 S.C. 216, 562 S.E.2d 615 (2002), were not presented to the Court of Appeals, either in first attempting to convince that Court not to dismiss SCDOT's appeal as untimely, or in SCDOT's Petition for Rehearing after the Court of Appeals had held the appeal untimely.

In asserting that the issues were not raised, Respondent cites only the initial part of SCDOT's Questions Presented 2 and 3 and the complete Question 4, (Respondent's Return to Petition for Certiorari pp. 9-10) as follows:

> 2. Did the Court of Appeals err in applying the holding of Quality Trailers Products to SCDOT's appeal?
>
> 3. Did the Court of Appeal[s] err in concluding the trial court's oral denial of SCDOT's motion for JNOV preserved all of its arguments on notice?
>
> 4. Did the [C]ourt of Appeals err in holding SCDOT's Rule 59(e) motion did not toll the time for appeal even if, in denying the motion for JNOV, the trial court reversed its view of the law on which it instructed the jury and for the first time, rule that pre-repair notice was sufficient, thereby making

the Rule 59(e) motion the first opportunity to challenge this new ruling?

To the extent that Respondent is challenging only the cited portions of the Questions Presented 2 and 3, it is amply clear that all of these arguments were made to the Court of Appeals. First, as summarized in Question 2, SCDOT consistently and repeatedly argued before the Court of Appeals that *Quality Trailer Products* did not apply to the facts presented here. (Appellant's Brief on Timeliness pp. 3-7, 9-11; Petition for Rehearing 9-10). Hence, SCDOT argued that it was error for the Court of Appeals to conclude that SCDOT's motion for JNOV was a successive motion under the standard of *Quality Trailer Products*. SCDOT also argued, as stated in its question 2 that merely because the same issue was be [sic] raised in both motions should not be determinative in applying the sanction of *Quality Trailer Products*. (Petition for Rehearing p. 11).

Second, as summarized in Question 3, SCDOT also argued that the written Rule 59(e) motion was made necessary because the trial judge's oral denial of the post-trial motions did not provide a specific ruling on each of its contentions on the issue of notice: that *Summer v. Carpenter*, 328 S.C. 36, 492 S.E.2d 55 (1997), was a correct statement of the law, and that under that standard, there was no evidence of post repair notice of the condition to SCDOT. Also, the trial court's recitation of only pre-repair notice revealed an internal inconsistency, since the court had previously instructed the jury on interrupted notice. Hence, SCDOT argued that the trial court's oral ruling was at best an implicit ruling and did not preserve both arguments on notice. (Brief on Timeliness pp 7-9; Petition for Rehearing pp 2-6). Appellant specifically argued, as

stated in Question 3 that the trial court's oral ruling was an implicit ruling on the notice issues. (Petition for Rehearing pp. 2-7 and 6-7).

Third, as stated in Question 4, SCDOT argued that the trial court shifted the legal basis for its ruling in denying the oral post-trial motions. Originally the trial judge charged the jury on interrupted notice. However, it orally denied the post-trial motions on the grounds that there was adequate notice and in support of its conclusion, cited only the testimony of one witness who testified only to pre-repair conditions, thereby creating ambiguity in its ruling and raising for the first time, the issue of internal inconsistency in its decision. (Appellant's response to Respondent's Return to Petition for Rehearing pp. 2-3), (Petition for Rehearing pp 3-7).

CONCLUSION

For all of the foregoing reasons, as well as those set forth in the Petition, Petitioner respectfully requests this Court grant Certiorari to review the decision of the Court of Appeals.

/s/ Pete Kulmala
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November 22, 2002
Barnwell, South Carolina

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ALLENDALE COUNTY
Court of Common Pleas
Daniel E. Martin, Sr., Circuit Court Judge

Case No. 99-CP-03-008

Hattie Rose Elam, Respondent,

v.

South Carolina Department of Transportation, Petitioner.

PROOF OF SERVICE

I certify that I have served the Petitioner's Reply to Respondent's Return on Hattie Rose Elam by depositing a copy of it in the United Sates Mail, postage prepaid, on November 22, 2002, addressed to her attorney of record, H. Woodrow Gooding, Jr. and Mark B. Tinsley, Esquires, PO Box 1000, Allendale, South Carolina 29810.

/s/ Pete Kulmala
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Attorneys for Petitioner, SCDOT

November 22, 2002

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	Civil Action No. 93-CP-23-3878
Rebekah Wooten, a minor by her Guardian ad Litem, Margaret Wooten	Civil Action No. 93-CP-3879
Plaintiff,	POST-TRIAL MOTIONS
versus	(Filed Jul. 10, 1995)
South Carolina Department of Transportation f/k/a South Carolina Department of Highways and Public Transportation, City of Greer, the Greenville County School District,	

Pursuant to Rules 50 and 59 of the South Carolina Rules of Civil Procedure, Defendant South Carolina Department of Transportation, by its undersigned attorney, hereby moves the court for relief from the unfavorable jury verdicts rendered in favor of each Plaintiff in this matter on June 30, 1995.

As will be set out more fully below, South Carolina Department of Transportation seeks a ***judgment notwithstanding the verdict***, (JNOV), pursuant to Rule 50(b), or in the alternative, a ***new trial***, pursuant to Rule 59(a)1.

JNOV Rule 50(b)

That the close of the Plaintiff's case and at the close of the evidence presented by the Defendant, the Department of [T]ransportation (hereafter DOT) move[s]

for a directed verdict on the grounds that the evidence, even when considered in a light most favorable to the Plaintiff, allowed for only one inference, that being that the Defendant was entitled to judgment as a matter of law. These motions were denied. Subsequently, the jury returned verdicts in favor of the Plaintiffs. Therefore, pursuant to Rule 50 (b), DOT hereby moves for judgment notwithstanding the jury's verdicts, in accordance with its motions for directed verdict.

The grounds for the motion are as stated above. Specifically, DOT contends that the evidence presented is susceptible to only one conclusion, that being that the Defendant is entitled to judgment as a matter of law. This conclusion is appropriate for the following reasons:

JUDGMENT NOTWITHSTANDING THE VERDICT

1. The only reasonable inference from all of the evidence is that the DOT was not negligent.

2. The only reasonable inference from all of the evidence is that no act or omission of the DOT was the proximate cause of the Plaintiff's injury.

3. The only reasonable inference from all of the evidence is that the DOT owed no duty to the Plaintiff, the breach of which is the proximate cause of the accident.

4. The only reasonable inference from all of the evidence is that it was not foreseeable that students would be crossing at the intersection because alternative bus transportation had been arranged for all students who lived across the highway.

5. The only reasonable inference from all of the evidence is that the DOT was not negligent in exercising its discretion to not place a student crosswalk at the intersection.

6. The only reasonable inference from all of the evidence is that the proximate cause of the Plaintiff's injuries was the sole or combined negligence of persons or entities other than the DOT.

7. The only reasonable inference from all of the evidence is that the Plaintiff was more than 50 percent at fault in causing her own injuries.

8. The only reasonable inference from all of the evidence is that the DOT was not negligent because it was reasonable to not place a student crossing at the location of the accident because the school was providing transportation and the school wanted to discourage the students from trying to cross U.S. 29.

9. The DOT is entitled to judgment notwithstanding the verdict because it is immune from liability for the discretionary [sic] it made when faced with alternatives which it weighed with the competing considerations and made a conscious choice.

10. The DOT is immune from liability for a loss resulting from the supervision, protection, control or custody of a student.

11. The DOT is immune from liability for a loss resulting from an act or omission of a person who is not a government employee.

12. The DOT is immune from liability for a loss resulting from the absence, condition, or malfunction of

any sign, signal, guardrail, or median barrier or other similar item unless there is actual or constructive notice.

13. The DOT is immune from liability for a loss arising from the failure to initially place any sign, signal, guardrail, median barrier or other device when the failure results from a discretionary act, which it did.

NEW TRIAL Rule 59 (a)1

Rule 59(a)1 permits the granting of a new trial on the motion of any party in a jury trial "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the State." DOT hereby moves for a new trial on the following grounds:

I. The verdicts are against the greater weight of the evidence.

Unlike the standard applied to motions for directed verdict and JNOV, the standard for the grant of a new trial on the ground that the verdict is against the weight of the evidence is one of fairness. The trial court is to prevent injustice.

II. That the Court should exercise its discretion sitting as the thirteenth juror.

The court has unlimited discretion to prevent the miscarriage of justice, sitting as a "thirteenth juror." *South Carolina Department of Highways vs. Dolphin,* 275 S.C. 205, 269 S.E.2d 329 (1980).

The Court should grant a new trial based on the errors in the jury charge on the grounds that were stated at the time of the objections to the jury charge and which are incorporated here.

a). Given the information provided to them by the principal of Greer Middle School, the prospect of a student from that school crossing the intersection in question could not be found to be foreseeable by the DOT. Consequently, the jury could not have found that the actions of the DOT were the proximate cause of the Plaintiff's injuries.

b). The evidence at trial revealed that the minor Plaintiff was specifically forbidden from crossing the intersection by her mother, and had bus transportation available to her which she had used daily for a number of months as well has having been instructed concerning calling her mother in the event she missed the school bus. Further, the minor Plaintiff was standing on a median in the middle of the intersection immediately prior to the accident and was motioned to remain there by the driver of another vehicle headed in her direction. In spite of this, she suddenly darted out into the path of another vehicle. These facts result in only one conclusion. That being that the Plaintiff's own actions were the proximate cause of her injuries. Fundamental fairness requires that a new trial be granted as the jury's verdict is simply not supported by the undisputed evidence.

NEW TRIAL REMITTITUR

Under South Carolina Code Section 15-78-120(a)(1) no person may recover more than two hundred fifty thousand ($250,000.00) dollars because of a loss from a single occurrence regardless of the number of agencies involved. The verdict of three hundred fifteen thousand ($315,000.00)

dollars in favor of the minor Plaintiff must therefore be reduced to that of the statutory maximum allowed by the statute. Specifically, the Defendant, DOT seeks Remittitur as follows:

1. The verdict is beyond the statutory cap of liability as established by the General Assembly when it partially waived sovereign immunity and the verdict should be reduced to $250,000.00

2. The verdict should be reduced by the amount paid in settlement by or on behalf of Joyce Henderson, the driver of the vehicle that struck the Plaintiff, which amount should be allowed as a set off or credit.

3. The verdict should be reduced by the sum paid by or on behalf of the Greenville County School District as a set off or credit.

Therefore, for the foregoing reason, DOT seeks a new trial, either by the entry of a ***judgment non obstante veredicto***, or by the court's direct order of a new trial.

Respectfully submitted,

CODE & WESTON, P.A.

/s/ Jeff Weston

Jeff Weston
Attorney for the Defendant
South Carolina Department of Transportation
1300-D. East Washington Street
Greenville, South Carolina 29607-1858

Dated: July 10, 1995

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE Rebekah Wooten, a minor by her Guardian Ad Litem Margaret Wooten Plaintiff, vs. SC Department of Transportation f/k/a South Carolina Department of Highways and Public Transportation, Defendants.	IN THE COURT OF COMMON PLEAS C.A. NO. 93-CP-23-3878
STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE Margaret Wooten, Plaintiff, vs. SC Department of Transportation f/k/a South Carolina Department Highways and Public Transportation, Defendants.	C.A. NO. 93-CP-23-3879 ***ORDER*** (Filed Aug. 8, 1995)

DEFENDANT'S MOTION FOR JNOV RULE 50(B)

The Defendant's Motion for *Judgement Notwithstanding the Verdict*, (JNOV), pursuant to Rule 50(B), is denied. Construing the evidence in the light most favorable to the non-moving party, more than one reasonable inference can be drawn from the evidence, and the case was properly submitted to the jury. *Flemming v. Borden, Inc.*, ___ S.C. ___, *450 S.E. 2d 589, OP. #24158 Filed 10/24 (1994)*; *Howard v. State Farm Mutual Insurance Company.*, ___ S.C. ___, *450 S.E. 2d 582, OP. #24155 Filed 10/24 (1994)*. Further, "[f]actual findings of the jury should not be disturbed unless a review of the records discloses no evidence which reasonably supports such finding." *Horry County v. Laychur*, ___ S.C. ___, *434 S.E. 2d 259, 261, OP. #23892 Filed 7/12 (1993)*. The evidence in this case is sufficient to support the jury's findings.

DEFENDANT'S MOTION FOR NEW TRIAL RULE 59(A)1

Defendant's Motion for New Trial, that the verdicts are against the greater weight of evidence, is denied. The jury verdict was consistent and justified by the evidence at trial and does not reflect any jury confusion, prejudice, or passion. *Folkens v. Hunt, 300 S.C. 251, 254, 387 S.E. 2d 265, 267 (1990)*.

Defendant's Motion for New Trial based on errors in the jury charge is denied. The jury was charged on the law of foreseeability, on the law of comparative negligence as well as other applicable law. The jury charges considered in their entirety are sufficiently broad to

enable the jury to understand the law and the issues. *Walls v. Suits*, ___ S.C. ___, *OP. #2311 Filed 2/27/95*, ___ S.E. 2d ___; *Waldrup v. Metropolitan Life Insurance Company, 274 S.C. 344, 263 S.E. 2d 652 (1980).*

DEFENDANT'S MOTION FOR NEW TRIAL REMITTITUR

Defendant's Motion for New Trial Remittitur based on S.C. Code Ann. 15-78-120 (a)(1) is denied. *Southeastern Freight Lines v. Hartsville*, ___ S.C. ___ *OP. #24054 Filed 4/15 (1995), 443 S.E. 2d 395*, is controlling in this case. Southeastern Freight Lines repealed the liability cap under the South Carolina Tort Claims Act found in S.C. Code Ann. § 15-78-120(a)(1).

The Defendant's Motion for New Trial Remittitur on Cause of Action No: 93-CP-23-3878 to reduce by the amount paid in settlement by or on behalf of Joyce Henderson, the driver of the vehicle that struck the Plaintiff, as set off is granted. By stipulation of the parties the jury verdict and Cause of Action No. 93-CP-23-3878 will be reduced by the amount of $6,250.00. Further, by stipulation of the parties, Cause of Action No. 93-CP-23-3878 will also be reduced by $9,000.00 the amount paid in settlement by or on behalf of the Greenville County School District as set off.

Defendant's Motion for New Trial Remittitur on Cause of Action NO. 93-CP-23-3879 to reduce by the amount paid in settlement by or on behalf of Joyce Henderson, the driver of the vehicle that struck the Plaintiff, as set off is granted. By stipulation of the parties, Cause of Action NO. 93-CP-23-3879 will be reduced by $6,250.00. Further, by stipulation of the parties, Cause of Action No.

93-CP-23-3879 will also be reduced by $1,000.00 the amount paid in settlement by or on behalf of the Greenville County School District as set off.

/s/ Paul Burch
Paul Burch, Judge

Date: August 2, 1995

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	IN THE COURT OF COMMON PLEAS
Rebekah Wooten, a minor by her Guardian ad Litem, Margaret Wooten, Plaintiff vs. South Carolina Department of Transportation f/k/a South Carolina Department of Highways and Public Transportation, Defendant.	C/A No. 93-CP-23-3878 NOTICE AND MOTION FOR RECONSIDERATION
Margaret Wooten, Plaintiff vs. South Carolina Department of Transportation f/k/a South Carolina Department of Highways and Public Transportation, Defendant.	(Filed Aug. 24, 1995) C/A No. 93-CP-23-3879

TO: PLAINTIFF, REBEKAH WOOTEN, A MINOR BY HER GUARDIAN AD LITEM, MARGARET WOOTEN, MARGARET WOOTEN, INDIVIDUALLY, AND HAROLD CHRISTIAN, ESQUIRE, ATTORNEY FOR THE PLAINTIFFS:

PLEASE TAKE NOTICE that the undersigned as attorneys for the Defendant South Carolina Department of Transportation, f/k/a the South Carolina Department of

Highways and Public Transportation, will move pursuant to Rule 59(e), S.C.R.C.P., before the Court of Common Pleas in the County of Greenville on the tenth (10th) day after service hereof at such time and place as may be set by the Court, for reconsideration of the Order of the Honorable Paul Burch, dated August 2, 1995, filed August 8, 1995, mailed August 10, 1995, and received by Counsel for Defendant on August 14, 1995.

This matter came before the Court on Defendant's post-trial Motions for Judgment Notwithstanding the Verdict, a New Trial Absolute, and a Remittitur. The Court granted the motion in part, and offset the verdicts for amounts paid in settlement by co-defendants. The Court otherwise denied the JNOV motion, and the new trial absolute, and refused to remit the $315,000.00 jury verdict to the $250,000.00 statutory cap on liability under the Tort Claims Act.

The Department of Transportation respectfully requests that the Court reconsider its decision on the grounds raised in the Defendant's Post-trial Motions, but not specifically addressed in the Trial Court's Order. The Department also respectfully requests that the Court reconsider its decision on the other grounds asserted in its Post-trial Motion, all of which are incorporated herein as if fully restated.

II. JUDGMENT NOTWITHSTANDING THE VERDICT

A. There is no evidence that the Department breached any duty which proximately caused injury to the Plaintiffs.

To the extent that the Trial Court's Order only broadly addresses the certain grounds raised in the JNOV

motion, the Department respectfully requests that the Trial Court reconsider the denial of the motion because the evidence presented at trial was susceptible of only one conclusion, that being that the Defendant is entitled to judgment as a matter of law, for the following reasons:

1. The only reasonable inference from all of the evidence is that the DOT was not negligent.

2. The only reasonable inference from all of the evidence is that no act or omission of the DOT was the proximate cause of the Plaintiff's injury.

3. The only reasonable inference from all of the evidence is that the DOT owed no duty to the Plaintiff, the breach of which was the proximate cause of the accident.

4. The only reasonable inference from all of the evidence is that it was not foreseeable that students would be crossing at the intersection because alternative bus transportation had been arranged for all students who lived across the highway.

5. The only reasonable inference from all the evidence is that the DOT was not negligent i[n] exercising its discretion to not place a student crosswalk at the intersection.

6. The only reasonable inference from all the evidence is that the proximate cause of the Plaintiff's injuries was the sole or combined negligence of persons or entities other than the DOT.

7. The only reasonable inference from all the evidence is that the Plaintiff was more than 50 percent at fault in causing her own injuries.

8. The only reasonable inference from all the evidence is that the DOT was not negligent because it was reasonable not to place a student crossing at the location of the accident because the school was providing transportation and the school wanted to discourage the students from trying to cross U.S. 29.

B. The Department is immune from liability as a matter of law.

To the extent that the Trial Court's Order does not address the following grounds raised for Judgment Notwithstanding the Verdict, the Department respectfully requests that the Court reconsider the denial of the JNOV motion and direct judgment for the Department because:

9. The DOT is entitled to judgment notwithstanding the verdict because it is immune from liability for the discretionary decision it made when faced with alternatives which it weighed with the competing considerations and from which it made a conscious choice.

10. The DOT is immune from liability for a loss resulting from the supervision, protection, control or custody of a student.

11. The DOT is immune from liability for a loss resulting from an act or omission of a person who is not a governmental employee.

12. The DOT is immune from liability from a loss resulting from the absence, condition or malfunction of any sign, signal, guardrail, or median barrier or other similar item unless there is actual or constructive notice.

13. The DOT is immune from liability for a loss arising from the failure to initially place any sign, signal, guardrail, median barrier or other device when the failure results from a discretionary act, which it did.

DESIGN/DISCRETIONARY IMMUNITY

The Department requests the Trial Court to reconsider its order and enter judgment for the Department because the evidence established that the Department is immune from liability for any injury which might have been proximately caused by the alleged defects in the design of the intersection in question.

Section 15-78-60 of the South Carolina Tort Claims Act provides that governmental entities are not liable for a loss resulting from . . . .

> (5) the exercise of discretion or judgment by the governmental entity or employee or the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee.
>
> * * *
>
> (15) absence, condition or malfunction of any sign, signal, warning device, illumination device, guardrail, or median barrier unless the absence, condition, or malfunction is not corrected by the governmental entity responsible for its maintenance within a reasonable time after actual or constructive notice. Governmental entities are not liable for the removal or destruction of signs, signals, warning devices, guardrails, or median barriers by third parties except on failure of the political subdivision to correct them within a reasonable time after actual or constructive

> notice. Nothing in this item gives rise to liability arising from failure of any governmental entity to initially place any of the above signs, signals, warnings devices, guardrails, or median barriers when the failure is the result of a discretionary act of the governmental entity. The signs, signals, warning devices, guardrails, or median barriers in this item are those used in connection with hazards normally connected with the use of public ways and do not apply to the duty to warn of special conditions such as excavations, dredgings, or public way construction. Governmental entities are not liable for the design of highways and other public ways . . . .

The Plaintiff seeks to impose liability on the Department of Transportation for its alleged negligence in not having a crossing signal, in the timing of the traffic signals, and the width of the median. Plaintiff's expert testified that these are design matters.

The Section 15-78-60(15) explicitly provides that: "Governmental entities are not liable for the design or highways and other public ways." The Department is entitled to judgment as [sic] because the Department is immune, as a matter of law, from liability for its design of highways and public roads under this subsection.

Matters of design are by definition matters of discretion and the Legislature specifically granted the Department complete immunity for its discretionary decisions in the design on highways and public ways in subsection 60(15).

And, in addition to the general grant of immunity to all governmental entities for discretionary decisions in

subsection 60(5), the Legislature also granted governmental entities, including in particular the Department of Transportation, immunity for its discretionary decisions involving the failure to place signs, signals, warning devices, or medians: "Nothing in this item gives rise to liability arising from failure of any governmental entity to initially place any of the above signs, signals, warning[ ] devices, guardrails, or median barriers when the failure is the result of a discretionary act of the governmental entity."

The Department proved that it assessed the alternatives, weighed the competing considerations and made conscious choices regarding the design of the crossing, the signals and the median for this intersection. The Department also proved that it exercised accepted professional standards in making those choices.

In addition, there was no evidence that the Department had any notice, actual or constructive, that these design choices were defective.

STUDENT PROTECTION IMMUNITY

Section 15-78-60(25) also provides that a governmental entity is not liable for any loss resulting from "responsibility or duty including but not limited to supervision, protection, control, confinement, or custody of any student . . . , except when the responsibility or duty is exercised in a grossly negligent manner." There was no evidence that the Department was grossly negligent in discharging any duty it owed to the Plaintiff student.

III. NEW TRIAL Rule 59(a)(1)

The Trial Court expressly denied the motion for a new trial on the ground that the verdict was against the greater weight of the evidence, but did not rule on the alternative request that the Court grant a new trial in the exercise of its discretion as the thirteenth juror. The Department respectfully requests that the Court reconsider these grounds as stated in the Post-trial motions, and incorporated herein, and grant a new trial.

IV. REMITTITUR

The Department also requests that the Court reconsider the denial of the Motion for a Remittitur to the $250,000.00 statutory cap.

The Department asks that the Court reconsider its decision in light of the Court of Appeals' decision in *Singletary v. S.C. Dept. of Education*, ___ S.C. ___, 447 S.E.2d. 231 (Ct. App., filed July 25, 1994), where the jury awarded the plaintiff $1,500,000 for injuries he received when he collided with a stalled school bus. The trial judge reduced the jury award to the statutory cap of $250,000.00 under the South Carolina Tort Claims Act. The Court of Appeals affirmed the trial court judgment.

The result reached in *Singletary* supports the Department's position that *Southeastern Freight Lines v. City of Hartsville*, ___ S.C. ___, 443 S.E.2d 395 (1994), did not repeal the statutory cap under the Tort Claims Act except in claims under the Uniform Contributions Among Joint Tortfeasors Act.

CONCLUSION

For these reasons, and those made in its previous motions, the Department respectfully requests that the Court reconsider its Order; vacate the Order; and enter an amended order granting judgment to the Defendant, granting a new trial, or remitting the verdict to the $250,000.00 statutory cap.

In the alternative, the Town requests that the Court amend its Order to address all the issues raised by the Town so that they are preserved for appeal.

Respectfully submitted,

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OF TRANSPORTATION

August 24, 1995

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	IN THE COURT OF COMMON PLEAS C.A. NO. 93-CP-23-3878
Rebekah Wooten, a minor by her Guardian Ad Litem Margaret Wooten Plaintiff, vs. South Carolina Department of Transportation f/k/a South Carolina Department of Highways and Public Transportation; and The City of Greer Defendants.	
Margaret Wooten, Plaintiff, vs. South Carolina Department of Transportation f/k/a South Carolina Department [of] Highways and Public Transportation, and The City of Greer Defendants.	C.A. NO. 93-CP-23-3879 ***ORDER*** (Filed Oct. 11, 1995)

This matter came on before the undersigned pursuant to the Defendant's Rule 59 (e) Motion to Reconsider. Rebekah Wooten is a minor who brought her lawsuit against the South Carolina Department of Transportation for injuries she received when she was struck by a vehicle

when crossing an intersection on Wade Hampton Boulevard in Greenville County, South Carolina. After a jury trial in June of 1995, the jury returned a verdict for Rebekah in the amount of three hundred and fifteen thousand dollars ($315,000.00) and for her mother one hundred and thirty-five thousand dollars ($135,000.00). After the jury verdict the Defendants were granted ten (10) days in which to file their post trial motions. On the tenth day defense counsel, Jeff Weston, filed Motions for Judgement Notwithstanding the Verdict, Motions for a New Trial, and a Motion for New Trial Remittitur. By consent, th[ese] motions were heard via a conference call between the undersigned, defense counsel, Jeff Weston and Harold Christian, Jr., attorney for the Plaintiffs. The Motions for Judgement Notwithstanding the Verdict and For A New Trial were denied. However, the Motion for New Trial Remittitur was granted in part. Specifically, the verdicts in both cases were reduced by amounts which were stipulated and which were based upon settlements received from other tort feasors [sic] previously released in these cases. However, the Defendant's Motion for New Trial Remittitur on the grounds that the State Tort Claims Act created a two hundred and fifty thousand dollar ($250,000.00) recovery limit was denied under *Southeastern Freight Lines v. Hartsville*, ___ S.C. ___ OP. #24054 Filed 4/15 (1995), 443 S.E. 2d 395.

This Court's Order was signed August 2, 1995, filed August 10, 1995, and served on Defense and Plaintiffs counsel on August 14, 1995.

Subsequently, the Defense attorney filed a second set of Post Trial Motions under South Carolina Rule of Civil Procedure Rule 59(e). This motion requested that the Court reconsider its Order dated August 2, 1995. This

Court has carefully reconsidered all matters raised by this Motion, and finds as follows:

I. Judgement Notwithstanding the Verdict

The Defendant contends that there is no evidence that the Department breached any duty which proximately caused injury to the Plaintiffs and that it was therefore entitled to JNOV and requested that the Trial Court reconsider the denial of Defendant's previous Motion. The Defendant set forth thirteen initial grounds for reconsideration. The Court initially considered each of these grounds, and has now reconsidered them and finds that the Request for Reconsideration of the Judgement Notwithstanding the Verdict should be and is denied. The evidence in this case is sufficient to support the jury's verdict. Construing the evidence in [the] light most favorable to the non-moving party, more than one reasonable interest can be drawn from the evidence, and the case was properly submitted to the jury. *Flemming v. Borden, Inc.*, ___ *S.C.* ___, *450 S.E. 2d 589, OP. #24158 Filed 10/24 (1994)*; *Howard v. State Farm Mutual Insurance Company.*, ___ *S.C.* ___, *450 S.E. 2d 582, OP. #24155 Filed 10/24 (1994)*. Further, "[f]actual findings of the jury should not be disturbed unless a review of the record discloses no evidence which reasonably supports such finding." *Horry County v. Laychur*, ___ *S.C.* ___, *434 S.E. 2d 259, 261, OP. #23892 Filed 7/12 (1993)*. The Defendant's thirteen grounds were reviewed as follows:

1) "The only reasonable inference from all the evidence is that the Department of Transportation was not negligent." The Court disagrees with this and finds that there was evidence upon which the

jury could have found that the Department of Transportation was negligent.

2) "The only reasonable inference from all the evidence is that no act or omission of the Department of Transportation was the proximate cause of the Plaintiff's injury." The Court disagrees with this and finds that there is evidence upon which the jury could have found that the an [sic] act or omission of the Department of Transportation was the proximate cause of the Plaintiff's injury.

3) "The only reasonable inference from all of the evidence is that the Department of Transportation owed no duty to the Plaintiff, the breech [sic] of which was the proximate cause of the accident." The Court disagrees and finds that there was evidence and inferences therefrom upon which the jury could find that the Department of Transportation owed a duty to the Plaintiff, the breech [sic] of which would be the proximate cause of the accident.

4) "The only reasonable inference from all of the evidence is that it was not foreseeable that students would be crossing at the intersection because alternative bus transportation had been arranged for all students who lived across the highway." The Court disagrees and finds that there [was] evidence from which a jury could find that it would be foreseeable that people, including students would be crossing the intersection.

5) "The only reasonable inference from [ ] all of the evidence is that the Department of Transportation was not negligent in exercising its discretion to not place a student crosswalk at the intersection." The Court disagrees and finds that there is evidence from which a jury could find that the Department of Transportation was negligent and

that it failed to exercise professional discretion by not placing a crosswalk at the intersection.

6) "The only reasonable inference from all of the evidence is that the proximate cause of the Plaintiff's injuries was the sole and combined negligence of other persons or entities other than the Department of Transportation." The Court disagrees and finds that there was evidence and/or inferences therefrom upon which the jury could find that the negligence of the Department of Transportation was the cause of the Plaintiff's injuries.

7) "The only reasonable inference from all the evidence is that the Plaintiff was more than 50% at fault in causing her own injuries." The Court disagrees and finds that there was evidence and reasonable inferences therefrom from which a jury could determine that the Plaintiff was less than 50% at fault in causing her injuries.

8) "The only reasonable inference from all the evidence is that the Department of Transportation was not negligent because it was reasonable not to place a student crossing at the location of the accident because the school was providing transportation and the school wanted to discourage the students from trying to cross Wade Hampton Boulevard." The Court disagrees and finds that there is evidence and inferences therefrom from which a jury could find that the Department of Transportation was negligent in failing to place a crossing at the location of the accident.

9) "That the Department of Transportation is entitled to Judgement Notwithstanding the Verdict because it is immune from liability for the discretionary decision it made when faced with the alternatives which it weighed with the competing

considerations and from which it made a conscious choice." The Court disagrees and finds that there was evidence and inferences therefrom upon which a jury could find that the Department of Transportation failed to exercise professional discretion and this was a matter for the jury.

10) "The Department of Transportation is immune from liability for a loss resulting from the supervision, protection, control or custody of a student." The Court disagrees and finds that the issue of negligence was one properly submitted to the jury.

11) "The Department of Transportation is immune from liability for a loss resulting from an act or omission of a person who is not a governmental employee." The Court disagrees and finds that there was evidence from which a jury could find that persons who were employed by the Department of Transportation were negligent causing the Plaintiff's injury.

12) "The Department of Transportation is immune from liability from a loss resulting from the absence, condition or malfunction of any sign, signal, guardrail, or median barrier or other similar items unless there is actual or constructive notice." The Court disagrees. The jury was properly instructed on this matter, the Court finds that there was evidence from which the jury could find negligence under the correct legal standard, and more specifically evidence that the Department of Transportation had actual or constructive notice.

13) "The Department of Transportation is immune from liability for a loss arising from the failure to initially place any sign, signal, guardrail, median barrier or other device when the failure results

from a discretionary act, which it did." The Court disagrees and finds that the jury was properly charged on the law regarding this matter. Further, that there was evidence from which the jury could find that the Department of Transportation failed to exercise professional discretion.

II. Design/Discretionary Immunity

The Defendant requests that the Trial Court reconsider its Order and enter judgement for the Department of Transportation because the evidence establishes that the Department of Transportation is immune from liability for any injury which might have been proximately caused by the alleged defects in the design of the intersection in question. This portion of the Defendants motion is based upon that portion of the South Carolina Tort Claims Act which grants to governmental entities immunity when the entity has exercised discretion in the performance or failure to perform the activities of which the Plaintiffs complain; and secondly, that upon that portion of the South Carolina Tort Claims Act which states that governmental entities are not liable for the design of highways and other public ways.

The Court disagrees. This Court finds that the jury was properly charged on the issue of discretion pursuant to Section 15-78-60 of the South Carolina Tort Claims Act. Further, that there was evidence upon which the jury could find that the Defendant failed to exercise professional discretion.

As to the Defendants contention that this Court should issue an Order of Judgement for the Department of Transportation based upon that portion of the South

Carolina Tort Claims Act which provides that governmental entities are not liable for the design of highways and other public ways, this Court disagrees. First, the Defendants did not raise this issue in its Post Trial Motions and therefore such issue is waived. However, assuming for argument['s] sake that the issue of design is properly before this Court, the Court finds that there is evidence from which the jury could find that the issue of which the Plaintiff complained did not fall within the area of design of highways and other public ways, but more properly fell within that portion of the Tort Claims Act dealing with absence, condition or malfunction of any sign, signal, warning device, illumination device, guardrail, [or] median barrier and that there is evidence to support the jury's findings that such was not corrected by the governmental entity responsible for its maintenance within a reasonable time after actual or constructive notice. Further, that there is evidence to support the finding that the government negligently failed to initially place any of such signs, signals, warning devices, guardrails or median barriers and that the Department of Transportation did not exercise professional discretion.

That is, this Court finds that there is evidence that the Department had actual or constructive notice of the absence, condition or malfunction of any sign, signal, warning device, illumination device, guardrail or median barrier. Further, that there does exist evidence that failure to place such signs, signals, warning devices or medians resulted from the failure to exercise professional discretion by this governmental entity. Therefore, this portion of the Defendant's Motion is denied.

III. Student Protection Immunity

The Defendant alleged that the portion of Section 15-78-60 (25) of the South Carolina Tort Claims Act which provides that a governmental entity is not liable for any loss resulting from "responsibility or duty including but not limited to supervision, protection, control, confinement or custody of any student . . . , except when the responsibility or duty is exercised in a grossly negligent manner," applies to protect the Department of Transportation from responsibility for the injuries suffered by the Plaintiff herein. However, this action on behalf of the Plaintiff arises not out of a duty owed by the Defendant, Department of Transportation for the supervision, protection, control, confinement or custody of a student, but for a duty arising out of the alleged defect of the intersection and does not involve matters contained in Section 15-78-60 (25) of the South Carolina Tort Claims Act. However, if the Defendant asserts that it had responsibility or duty for supervision, protection, control, confinement or custody of the minor Plaintiff herein, then this Court finds that there was evidence upon which the jury could find that the responsibility was exercised in a grossly negligent manner.

IV. New Trial Rule 59 (a) (1)

The Rule 59 (e) Motion of the Defendants requests that the Court reconsider its grounds for a new trial pursuant to Rule 59 (a) (1). However, the jury verdict is consistent and justified by the evidence at trial and does not reflect any jury confusion, prejudice, or passion. *Folkens v. Hunt, 300 S.C. 251, 254, 387 S.E. 2d 265, 267 (1990).*

The Court finds that there was sufficient evidence in this case to warrant submission of the matters herein to the jury and therefore, finds that this is not a proper case to sit as a "thirteenth juror", but again, finds that the matter was properly submitted to the jury and that there was competent evidence to support the findings of the jury.

Finally, Defendants Motion for New Trial based on errors in the jury charge is denied. The jury was charged on the law of foreseeability, the law of comparative negligence as well as other applicable law. The jury charge when considered in its entirety is sufficiently broad to enable the jury to understand that law and the issues. *Walls v. Suits*, ___ S.C. ___, *OP. #2311 Filed 2/27/95*, ___ *S.E. 2d* ___; *Waldrup v. Metropolitan Life Insurance Company, 274 S.C. 344, 263 S.E. 2d 652 (1980).*

V. Remittitur

The Defendants request that the Court reconsider the denial of the Motion for Remittitur to the two hundred and fifty thousand dollar ($250,000.00) "statutory cap". This Court finds that this matter was previously raised by the Defendants Post Trial Motion, was properly addressed and denied. This Court finds that the Motion for New Trial Remittitur on the basis of the State Tort Claims Act creating a two hundred and fifty thousand dollar ($250,000.00) limitation on recovery was properly denied pursuant to *Southeastern Freight Lines v. Hartsville*, ___ *S.C.* ___ *OP. #24054 Filed 4/15 (1995), 443 S.E. 2d 395.*

Order

It is, therefore, ORDERED that the Defendants Rule 59 (e) be and is hereby denied.

/s/ Paul M. Burch
Paul M. Burch, Judge

Date: October 4th, 1995

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
COURT OF COMMON PLEAS
THE HONORABLE PAUL M. BURCH,
CIRCUIT COURT JUDGE

CIVIL ACTION NO. 93-CP-23-3878

Rebekah Wooten, a minor by her Guardian Ad Litem Margaret Wooten, **RESPONDENT,**

versus

South Carolina Department of Transportation f/k/a South Carolina Department of Highways and Public Transportation, **APPELLANT.**

CIVIL ACTION NO. 93-CP-23-3879

Margaret Wooten, **RESPONDENT,**

versus

South Carolina Department of Transportation f/k/a South Carolina Department of Highways and Public Transportation, **APPELLANT.**

NOTICE OF APPEAL

The Defendant, South Carolina Department of Transportation f/k/a South Carolina Department of Highways and Public Transportation, appeals from the following:

1. The Judgment in each of the above referenced actions dated June 30, 1995;

2. The Order of the Honorable Paul M. Burch dated August 2, 1995, and filed August 8, 1995 denying Defendant's Post-Trial Motions; and

3. The Order of the Honorable Paul M. Burch dated October 4, 1995, filed on October 11, 1995, and received by Defendant's counsel on October 13, 1995, denying Defendant's Rule 59(e) Motion to Reconsider.

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The South Carolina Court of Appeals

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MEMORANDUM

TO: Daniel Shearouse
Clerk, Supreme Court

FROM: Kenneth A. Richstad
Clerk, Court of Appeals

RE: Collins Music Co., Inc. v. IGT
Case #200122041

DATE: October 23, 2002

The Court has asked me to request certification of this case.

Pursuant to a motion to dismiss, a panel of this Court dismissed the appeal on the ground that a second post-trial motion had not tolled the time to serve the notice of appeal.

The appellant has filed petition for rehearing, rehearing *en banc*, or reinstatement and certification.

Four of the Court of Appeals judges are recused in this matter. Thus, the court cannot convene a quorum to consider the *en banc* request.

In view of these disqualifications and the significance of the issue in South Carolina trial and appellate procedural law, the Court of Appeals asks the Supreme Court to certify this case.

The complete file is attached.

The Supreme Court of South Carolina

Collins Music Co., Inc. Respondent,

v.

IGT a/k/a IGT-North America, Appellant.

ORDER

Pursuant to Rule 204(b), SCACR, this appeal is hereby certified for review by this court.

IT IS SO ORDERED.

/s/ Jean Hoefer Toal C.J.
FOR THE COURT

Columbia, South Carolina

November 15, 2002

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

John L. Breeden, Jr., Circuit Court Judge

Opinion No. 2002-OR-405 (S.C. Ct. App. filed September 4, 2002)

Collins Music Co., Inc., Respondent,

v.

IGT a/k/a IGT-North America, Petitioner.

PETITION FOR A WRIT OF CERTIORARI

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INDEX

Certificate of Counsel 4

Questions Presented 5

Statement of the Case 5

Arguments

1. THE COURT OF APPEALS DISREGARDED PRIOR ERROR PRESERVATION LAW BY HOLDING THAT A TRIAL JUDGE'S IMPLICIT RULING PRESERVES ISSUES FOR APPEAL 7

2. THE COURT OF APPEALS IMPROPERLY APPLIED THE FACT-SPECIFIC HOLDING IN *QUALITY TRAILER* TO THIS CASE 13

3. A MOTION BROUGHT UNDER RULE 59(e), SCRCP, WHICH SEEKS ONLY 59(e) RELIEF AND ARGUABLY RAISES UNPRESERVED ISSUES TO THE TRIAL COURT IS SUFFICIENT TO TOLL THE TIME FOR APPEAL 16

4. THERE ARE SPECIAL AND COMPELLING REASONS FOR THIS COURT TO GRANT THE PETITION FOR WRIT OF CERTIORARI 18

Conclusion 21

CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that a Petition for Rehearing, for Rehearing *en banc*, and, alternatively, for Reinstatement and Certification to this Court was timely made before the South Carolina Court of Appeals. However, four of the Court of Appeals' judges, including one member of the three-judge panel that issued the decision,

recused themselves in the matter. The three-judge panel was therefore unable to convene a quorum to consider the rehearing and reinstatement requests, and the Court of Appeals was unable to convene a quorum to consider the *en banc* rehearing request. On October 23, 2002, a memorandum from Kenneth A. Richstad to Daniel Shearouse conveyed the Court of Appeals' request that the appeal be certified for review by this Court because of "these disqualifications and the significance of the issue in South Carolina trial and appellate procedural law. . . . " (App. p. 328).

On November 15, 2002, the Chief Justice issued an Order For The Court certifying the case for its review pursuant to Rule 204(b), SCACR. (App. p. 329). Subsequently, on January 10, 2003, this Court issued its Order deeming the request for an *en banc* hearing denied in view of the unusual posture of the matter when it was certified by this Court.

Until receipt of the letter from the Deputy Clerk of the Court of Appeals on January 28, 2003, Petitioner was not aware that one of the four Court of Appeals' judges disqualified in this matter was also a member of the panel that issued the decision. (App. p. 332). This is a circumstance of which this Court also was apparently unaware when it issued its Order of January 10, 2003, in which it deemed denied only the *en banc* rehearing request. (App. p. 330). This Court did not specifically address and Petitioner is uncertain of the status of Petitioner's request for a rehearing by the three-judge panel.

Petitioner has been directed by this Court to file a petition for writ of certiorari and therefore has assumed for purposes of this Petition that its rehearing request

would be similarly treated and also deemed denied by this Court. Petitioner asks the Court not to lose sight of the fact that, substantively, Petitioner has been provided no rehearing or review of any kind of the Court of Appeals' decision.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding, contrary to all error preservation precedent, that a trial judge's implicit ruling on issues in a post-trial order preserved those issues for appellate review?

2. Did the Court of Appeals err in its broad application of the fact specific holding of this Court in *Quality Trailer*[1] to dismiss [P]etitioner's appeal when the facts here are not comparable to those of *Quality Trailer* and do not support such broad application?

3. Did the Court of Appeals err in holding [P]etitioner's motion, brought under Rule 59(e), SCRCP, which raised issues at least arguably not ruled on by the trial judge and only sought 59(e) relief, was not sufficient for the purpose of tolling the time for filing a notice of appeal?

4. Do special and compelling reasons exist for this Court to grant the Petition for Writ of Certiorari?

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[1] *Quality Trailer Products, Inc. v. CSL Eqpt. Co., Inc. and I. Corp.*, 349 S.C. 216, 562 S.E.2d 615 (2002).

STATEMENT OF THE CASE

This action was brought by Respondent (hereinafter "Collins") based upon a video gaming machine distributorship agreement between Petitioner (hereinafter "IGT") and Collins. In response to Collins' allegations IGT pled several counterclaims. The trial concluded on August 3, 2001 with a verdict in Collins' favor for $15,000,000. On August 13, 2001, IGT filed a motion for Judgment Notwithstanding the Verdict, New Trial, and New Trial *Nisi Remittitur* pursuant to Rules 50(b) and 59(a), SCRCP. [hereinafter "post-trial motions"]. (App. p. 146).

One post-trial motion requested that the trial judge grant IGT a JNOV under Rule 50, SCRCP, upon the grounds raised in IGT's motions for directed verdict. The other requested a new trial under Rule 59(a), SCRCP, based upon the thirteenth juror doctrine and upon errors on evidentiary rulings and jury charge instructions. Alternatively, IGT moved for a new trial nisi remittitur, specifically requesting the judge to remit the verdict to $2,099,629. Each of these components of the post-trial motions were supported by twenty-eight separate grounds.

Without oral argument, the trial judge issued a one-page order on August 29, 2001 denying IGT's motions for the following reasons. (App. p. 170). In denying the motion for a new trial, the order stated, "as to IGT's motion for new trial under Rule 59, SCRCP, all issues were properly addressed at trial." In denying IGT's motions for JNOV, the order stated, "I conclude that there is sufficient evidence to sustain the jury's verdict." Finally, in denying IGT's nisi remittitur motion, the order stated, "the damages awarded by the jury are within the range of damage shown by the evidence."

On September 13, 2001, IGT's counsel filed a motion pursuant to Rule 59(e), SCRCP. (App. p. 171). The motion was filed for two major reasons. First, IGT's counsel was concerned with the body of South Carolina error preservation law requiring a trial judge to rule, and moreover *explicitly* rule, on each issue raised in a post-trial motion. A detailed discussion of this law follows. Second, IGT's counsel was convinced that the order had not ruled on several issues *at all*, and had not ruled with sufficient explicitness on *any issue* to preserve the issues for appellate review. The 59(e) motion requested only that the trial judge make "specific rulings, and the basis therefore, as to each ground raised in defendant's [post-trial motions]." This motion ensured that even if the trial judge still failed to consider and explicitly rule on each issue, the issues would nevertheless be preserved for appellate review.

IGT's counsel had concluded from the post-trial order that the trial judge was not going to grant any relief sought by IGT, and as expected, the trial judge denied the 59(e) motion in another one page order dated October 29, 2001 – again failing to explicitly rule on any of IGT's issues. (App. p. 176). Accordingly, on November 21, 2001, IGT timely filed and served its notice of appeal. (App. p. 1). IGT served and filed its initial brief on April 9, 2002, addressing several significant errors at trial which IGT believes will require a new trial or judgment in its favor.[2] (App. p. 10-85).

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[2] The Court of Appeals, by order dated, April 5, 2002, granted IGT's request to exceed the fifty-page limit. (App. p. 6).

On May 20, 2001, (four days after this Court's denial of a petition for rehearing in *Quality Trailer* on May 16, 2002) Collins filed a motion to dismiss IGT's appeal. (App. p. 88). The Court of Appeals granted the motion by order dated September 4, 2002. *Collins Music Co. v. IGT*, Op. No. 2002-OR-405 (S.C. CT. App. filed September 4, 2002). (App. p. 244). IGT timely filed a petition for rehearing, petition for rehearing *en banc*, and alternatively for certification. (App. p. 252). Pursuant to this Court's instruction in its January 10, 2003 order (App. p. 330), IGT now seeks a writ of certiorari to review the decision of the Court of Appeals dated September 4, 2002.

ARGUMENT

1. THE COURT OF APPEALS DISREGARDED PRIOR ERROR PRESERVATION LAW BY HOLDING THAT A TRIAL JUDGE'S IMPLICIT RULING PRESERVES ISSUES FOR APPEAL

The trial judge's initial order denying IGT's post-trial motions raised several concerns about error preservation. These concerns, and the misconstruction of error preservation law by the Court of Appeals has ramifications not only for IGT, but for the trial bar or any party with a case currently on appeal or in the post-trial stage. Primarily, there is confusion about what action a party must take to preserve error when there are ambiguities in the trial judge's order denying post-trial motions. Also, a party now faced with a post-trial order which is inexplicit is placed in a "catch-22". If a 59(e) motion is made, the Court of Appeals may disagree about its necessity and hold the party outside the time for filing its appeal. Conversely, if the motion is not made, the Court of Appeals may disagree with that decision and hold that issues were not properly

preserved. By placing parties in this dilemma, the Court of Appeals disregards a line of South Carolina cases requiring parties to ask a trial judge to explicitly rule on issues not clearly addressed in a post-trial order.

Case law is replete with admonitions from this Court that, above all other appellate practice rules, preservation of issues for appeal is paramount. In *Kennedy v. The S.C. Retirement System,* 349 S.C. 531, 564 S.E.2d 322 (2001), this Court stated, "We reiterate this Court's longstanding principle of error preservation. 'Preserving issues for appellate review is a fundamental component of appellate practice. South Carolina appellate courts do not recognize the plan error rule.'" (Quoting Hon. Jean H. Toal, et al., *Appellate Practice in South Carolina* 65 (1999)).

There are many instances where both this Court and the Court of Appeals have refused to hear issues not properly preserved by a Rule 59(e) motion. As noted by Chief Justice Toal, "[W]here a party raises an issue, the trial court fails to rule upon the issue, and the party fails to raise the court's omission by way of a rule 59 motion, the issue is not ruled upon and, therefore, not preserved on appeal. . . . When an order is internally inconsistent, that inconsistency must be raised to the trial court by way of a post-trial motion before it is preserved for appellate review. . . . A post trial motion must also be made where there are *errors or inconsistencies* in the trial court's final order." (Hon. Jean H. Toal, et al[.], *Appellate Practice in South Carolina,* 59 (2d ed. 2002) citing *Great Game, Inc. v. S. C. Dept. of Revenue*, 339 S.C. 79, 529 S.E.2d 6 (2000); *Parker v. Shecut*, 340 S.C. 460, 531 S.E.2d 546 (Ct. App. 2000), *reversed on other grounds*, 349 S.C. 226, 562 S.E.2d 620 (2002); *Grant v. S.C. Coastal Council*, 319 S.C. 348, 461 S.E.2d 388 (1995)).

Our appellate courts have also held that 59(e) motions are required to preserve for appeal any issue not explicitly ruled upon. (*See I'On L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000); *Summer v. Carpenter*, 328 S.C. 36, 492 S.E.2d 55 (1997); *Pelican Bldg. Ctrs. v. Dutton*, 311 S.C. 56, 427 S.E.2d 673 (1993); *Noisette v. Ismail*, 304 S.C. 56, 403 S.E.2d 122 (1991); *Shealy v. Aiken Co.*, 341 S.C. 448, 535 S.E.2d 438 (1991); *Trivelas v. S.C. D.O.T.*, 348 S.C. 124, 558 S.E.2d 271 (Ct. App. 2001); *Vespazianni v. McAlister*, 301 S.C. 411, 415 S.E.2d 427 (Ct. App. 1992) et al[.]). In *Noisette*, *id.*, a case cited in over thirty-five error preservation decisions, this Court held that although the trial judge ruled on an issue (whether the defendant was an "insured" under an insurance policy), his ruling was not explicit as to whether the defendant was a "permissive user". Although the only way the defendant could have been an insured was as a permissive user, because the appellant failed to seek an explicit ruling with a 59(e) motion, this Court would not consider the issue on appeal.

Here, IGT made a reasonable determination that the trial judge's order did not explicitly rule on nearly all of the twenty-eight grounds contained in its post-trial motions. For instance, by denying *all* new trial motions because, "all issues [were] properly addressed at trial", the trial judge clearly failed to rule on or even allude to IGT's motion for new trial under the thirteenth juror doctrine, made for the first time *after* trial. Also, the order only dealt with Collins' claims, and failed to mention the issues addressing IGT's counterclaims, to which at least twenty

of the twenty-eight grounds pertained.[3] Additionally, by using the "sufficiency of the evidence" basis to deny *all* JNOV issues (which included both rulings of law by the judge at trial and sufficiency of evidence for the jury), it was at least unclear whether the judge had considered the JNOV grounds that were purely on issues of law.[4] IGT's response to the post-trial order, guided by *Noisette* and the litany of similar cases directing dire consequences in the alternative, was to file a 59(e) motion requesting the judge to specifically rule and state the basis as to each issue raised.

Here, the Court of Appeals held that the explicit ruling requirement is inapplicable in jury cases because a trial judge is not required to make findings of fact and law in jury cases. The Court of Appeals stated, "the requirement imposed upon the court by Rule 52(a), SCRCP, . . . is limited to cases tried without a jury or with an advisory jury and is inapplicable here." *Collins v. IGT* at 7 (2002). This view is wrong and confuses *two separate obligations*: the obligation of a party to present unresolved issues to the trial court for a ruling (in both jury and non-jury matters) and the obligation of a trial judge to make specific findings of fact and conclusions of law when required by Rule 52(a).

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[3] See grounds 3, 4, 5, 8, 9, 10, 11, 12, 14, 15, 17, 18, 21, 22, 23, 24, 25, 26, 27, and 28 in IGT's post-trial motions. (App. p. 147-150).

[4] See grounds 14, 15, 16, 17, 18, 24, 27, and 28 of IGT's post-trial motions. This ruling was also confusing because the judge addressed the issues as matters of law at trial. However, in the order, all JNOV issues were addressed as evidentiary matters – causing IGT to question whether the judge intended to change the basis of his rulings or simply did not rule on those issues at all.

A major flaw of the Court of Appeals' view is its lack of support by any authority. Even the Court of Appeal's stated basis for its holding – Rule 52 – makes no mention of an "explicit ruling requirement" in any case – jury or non-jury. In fact, as this Court held in *Noisette*, a party's obligation to seek an explicit ruling on all issues is totally unrelated to Rule 52. However, the Court of Appeals ignores this authority.

There is a [sic] another crucial flaw in the Court of Appeal's analysis. If the obligation to rule explicitly is tied only to a trial judge's obligation to make findings of fact and law, 59(e) motions would be unnecessary to preserve issues not explicitly ruled on when such findings are not required. It would also follow under this analysis that a 59(e) motion would never be required or appropriate after a jury trial. This, however, is not the law in South Carolina.

For instance, Rule 52(a) specifically makes findings of fact and law unnecessary in orders addressing summary judgment ("findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 . . .", Rule 52(a), SCRCP). However, despite this clear exemption, this [C]ourt and the Court of Appeals have repeatedly required 59(e) motions to preserve for review issues only implicitly ruled upon in summary judgment motions. (*See Summer v. Carpenter, id.*; *Trivelas v. S.C. D.O.T., id.*, et al[.]). For example, in *Walker v. The Bluffs Apartments*, 324 S.C. 350, 477 S.E.2d 472 (Ct. App. 1995), one of the appellant's arguments raised to the trial judge on motion for summary judgment was the common knowledge exception to the need for expert testimony. The judge found the expert's affidavit insufficient and granted

summary judgment without specifically ruling on the "common knowledge" issue. On appeal, the Court of Appeals refused to hear the issue, stating:

> We need not address this argument because *it is not properly before the court*. The record shows that Walker argued the common knowledge exception to Narmour's motion for summary judgment. The trial court ruled that Walker's expert was not qualified, but *did not* ***explicitly*** *rule* on Walker's argument for application of the common knowledge exception. (emphasis added)

The Court of Appeals' legal misconstruction of the explicit ruling requirement in IGT's case totally contradicts its decision in *Walker*. Furthermore, in *Walker* the Court of Appeals failed to mention Rule 52(a), and instead required an explicit ruling even though the trial judge was not required to make findings of fact or law.

Even further proof of the Court of Appeal's error is found in *Payton v. Kearse*, 319 S.C. 188, 460 S.E.2d 233 (Ct. App. 1995) (rev. on other grounds), a jury trial, where the Court of Appeals refused to hear an issue not properly addressed by the trial court, and not preserved by a 59(e) motion. The Court of Appeals held that although the issue on appeal (new trial based upon juror disqualification) was clearly raised to the trial judge, and the judge clearly denied the relief sought (new trial), the issue was not preserved because the order failed to specifically address it, and no 59(e) motion was made. However, although the trial court's post-trial order here did not explicitly address any of IGT's issues, the Court of Appeals ignored this omission. Moreover, the Court punished IGT for making a 59(e) motion – a motion it required the appellant in *Payton* to make.

No decision of this Court has changed the precedent of *Payton* or *Walker*. Also, not one case in South Carolina has ever held that the explicit ruling obligation of a trial judge does not apply to jury cases. In fact, case law actually requires 59(e) motions for inexplicit rulings in both jury trials and cases where Rule 52(a) requirements are not applicable. *Payton* even required a 59(e) motion where there was no doubt that the judge denied the relief sought in the post-trial motion. IGT had a reasonably based belief that the order denying its post-trial motions was not sufficiently explicit to preserve all issues for appeal and appropriately filed its 59(e) motion.

2. THE COURT OF APPEALS IMPROPERLY APPLIED THE FACT-SPECIFIC HOLDING IN *QUALITY TRAILER* TO THIS CASE.

The Court of Appeals makes two crucial errors of fact in applying *Quality Trailer* as the basis for its decision here. First, it treats IGT's 59(e) motion as identical to that of I. Corp.'s (the appellant in *Quality Trailer*) without any reference to the details of the *Quality Trailer* motion and thus, without any comparison of the specific relief sought by I. Corp. and IGT in their respective motions. Second, the Court of Appeals incorrectly defined IGT's 59(e) motion by its inclusion of the same grounds found in its post-trial motions.

Addressing the first error, unlike this Court in *Quality Trailer*, the Court of Appeals makes no comparison of the relief IGT sought in its post-trial motions with the relief sought in its 59(e) motion. In fact, reading the dismissal order without more leads the reader to the erroneous impression that IGT's 59(e) motion requested JNOV and new trial relief, not, as actually requested,

specific or explicit rulings. The entire premise of this Court's decision in *Quality Trailer* turned on its comparison of the relief sought in I. Corp.'s post-trial motions with that sought in its motion captioned under 59(e). This Court, pointing out that both motions sought identical relief (JNOV and new trial), concluded that the second motion was factually a successive JNOV and new trial motion, not a 59(e) motion as captioned.

Even the most cursory review of the two I. Corp. motions clearly validates this Court's decision in *Quality Trailer*. In its JNOV motion, I. Corp. prayed for the following:

> . . . [I. Corp.] ***respectfully prays to have the jury verdict and judgment of $86,314.53 in favor of Plaintiff, set aside and to have judgment entered in accordance with I. Corp[.]'s Motion*** for Directed Verdict ***and in support thereof states***: . . . (emphasis added.)[5] (App. p. 179).

In its second motion, captioned "59(e)", I. Corp. prayed for the exact relief sought in its initial motion. In almost a word-for-word duplication of the post-trial motions, the second motion's [sic] prayed as follows:

> . . . [I. Corp.] ***respectfully prays to have the jury verdict and judgment of $86,314.53 in favor of Plaintiff, set aside and to have judgment entered in accordance with I. Corp[.]'s Motion*** for Judgment Notwithstanding

[5] In a separate post-trial motion, I. Corp. prayed for a new trial on the same grounds as contained in its JNOV motion. (App. p. 194).

> the Verdict and ***with I. Corp[.]'s Motion for Directed Verdict*** or in the alternative prays for a new trial in accordance with I. Corp[.]'s Motion for New Trial ***and in support thereof states***: . . . (emphasis added.) (App. p. 205).

A comparison of these motions with IGT's corresponding motions clearly shows that IGT did not seek the same relief twice. IGT's post-trial motions for JNOV, new trial, and new trial nisi remittitur, requested the following relief:

> . . . IGT hereby moves the Court . . . for an Order granting IGT: (a) a judgment in favor of IGT notwithstanding the verdict [for Collins' causes of action] . . . (b) in the alternative a new trial absolute or remittitur to all causes of action of Collins, (c) a judgment in favor of IGT notwithstanding the verdict [on IGT's counterclaims] . . . (d) in the alternative, for a new trial absolute with regard to all of the causes of action set forth in IGT's Counterclaims. (App. p. 146).

Following the trial judge's one-page order denying these motions, the relief IGT sought in its 59(e) motion is entirely different from its post-trial motions. There, IGT only requested the following relief:

> The Defendant requests that the Court make specific rulings, and the basis therefore, as to each ground raised in Defendant's Motion for Judgment Notwithstanding the Verdict, New Trial and New Trial Remittitur filed August 13, 2001 with the Clerk of Court for Horry County. (App. p. 171).

Unlike I. Corp.'s prayer for identical relief in its post-trial and 59(e) motions, *not one word* of the relief IGT

sought in its 59(e) motion mirrored its post-trial motions. IGT asked only for the relief allowed by a 59(e) motion – specific rulings.

Compounding the first error, the Court of Appeals reached its decision by also noting that IGT included in its 59(e) motion the same grounds found in its post-trial motions, and on that basis defined IGT's 59(e) motion as a successive JNOV and new trial motion. This conclusion is misplaced. IGT's counsel repeated the grounds in its 59(e) motion only to be certain that each issue, even if not explicitly ruled on in response to the 59(e) motion, would be preserved for appellate review. As Chief Justice Toal advises, "Once an issue has been properly raised by a Rule 59(e) motion, it is preserved, and a second motion is not required if the trial court does not specifically rule on the issue so raised." Hon. Jean H. Toal, et al[.], *Appellate Practice in South Carolina*, 59 (2d ed[.]). The trial judge, presented in IGT's 59(e) motion with a second opportunity to explicitly rule on each ground, failed to do so.

The Court of Appeals defined IGT's 59(e) motion by the inclusion of these grounds and not by the relief they supported. However, motions have always been defined by the actual relief they seek, and never by the grounds supporting it. "The court will construe [the motions], however styled, to be the type proper for the relief requested." *Demers v. Roncor, Inc.*, 1992 U.S. App. LEXIS 14984 (9th Cir. 1992). (emphasis added.)

Unlike IGT, I. Corp. repeated the grounds from its post-trial motion in its "59(e)" motion in order to support a second request for JNOV and new trial relief. Although I. Corp[.] claimed in its petition before this Court that it's [sic] 59(e) motion was made solely for issue preservation purposes,

this Court correctly recognized that I. Corp. asked the trial court to reverse itself and grant the initial motions. This Court's holding in *Quality Trailer* is correct under the facts of that case. However, its holding is not correct under the facts of this case.

These two errors discussed above create an enormous dilemma for and raise profound questions of fairness not only to IGT, but also to the trial bar and all litigants. The Court of Appeals artificially molded IGT's 59(e) motion to fit within the parameters of this Court's decision in *Quality Trailer*. This artificial molding promotes the most severe injustice possible to IGT, dismissal of its appeal of a fifteen-million dollar judgment with no consideration of its merits.

3. A MOTION BROUGHT UNDER RULE 59(e), SCRCP, WHICH SEEKS ONLY 59(e) RELIEF AND ARGUABLY RAISES UNPRESERVED ISSUES TO THE TRIAL COURT IS SUFFICIENT TO TOLL THE TIME FOR APPEAL.

The last sentence of Rule 1, SCRCP, states that the rules are to be construed to achieve just determinations. This statement is consistent with the Rule 8(f), which provides that pleadings should be construed to "do substantial justice." The decision here does not comport with the intent of these rules.

IGT's 59(e) motion raised issues that were arguably unpreserved for appellate review. The Court of Appeals obviously disagreed with IGT's determination. However,

instead of viewing the motion as at least sufficient to toll the time for appeal[6] the Court of Appeals created a new condition by making the tolling provision dependent upon its hindsight determination of a 59(e) motion's necessity. Such a rule is egregiously unfair because it requires parties to clairvoyantly forecast, as through a crystal ball, an appellate court's view of the motion's necessity simply to toll the time for appeal. This is without precedent in any case or rule of court in South Carolina.

Moreover, the Court of Appeals' decision ignores federal precedent on point. The holdings in *Quality Trailer* and *Coward Hund*[7] are limited to situations where a party files successive JNOV/new trial or successive 59(e) motions. In deciding *Coward Hund*, the Court of Appeals looked solely to federal precedent, as no South Carolina authority existed. (citing *Brown v. United Ins. Co. of Am.*, 807 F.2d 1239 (5th Cir. 1987)). In reviewing the standard for "proper" 59(e) motions, the Court of Appeals should have likewise considered federal precedent in determining the sufficiency of the motion for purposes of tolling the time to appeal.

For purposes of tolling the time for appeal, federal courts view motions which even arguably could be 59(e) motions as proper. In *Forrest v. Occidental Petroleum Corp.*, 1990 U.S. App. LEXIS 19292 (9th Cir.), the court stated:

> We have previously liberally interpreted motions for reconsideration as having been filed pursuant

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[6] Rules 203(b)(1), SCACR and 59(f), SCRCP.

[7] 336 S.C. 1, 518 S.E.2d 56 (Ct. App. 1999).

> to Rule 59(e) in determining whether the time for filing a notice of appeal from the underlying judgment or order has run. . . . "Even if a [59(e)] motion is inartfully drawn or so defective that it could not properly be granted, ***it is still enough to toll the time for appeal***." (quoting *Sierra-On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415 (9th Cir. 1984). (emphasis added).

Instead of summarily dismissing a party's appeal because the 59(e) motion is not viewed as "necessary" or "proper", federal courts apply two standards of review for 59(e) motions – one standard when addressing the merits of the motion, and a less-strict standard when addressing the tolling effect of the motion. In *Forrest, id.*, the court stated:

> In cases addressing the time for appeal, we have generally found a motion for reconsideration to be within Rule 59(e) if it requests a substantive change in the judgment, *regardless of the grounds upon which it is raised* . . . [Even if a 59(e) motion] raises no new grounds but "simply rehashes arguments heard at trial', [it] may be made under Rule 59(e)." (quoting *Clipper Express v. Rocky Mountain Motor Tariff*, 690 F.2d 1240 (9th Cir. 1982)). (emphasis added).

The court further explained that, "On the other hand, when reviewing the merits of an order granting or denying a 59(e) motion, we apply a stricter standard." *Forrest* at 17.

Other federal cases follow the same principle. (*See Barnett v. Cross*, 893 F.2d 1336 (6th Cir. 1990) and *Cloud v. Summers*, 110 F.3d 67 (9th Cir. 1997)). In *Cloud*, the court held, "As we have ruled, if a motion served within ten days of judgment could have been brought under Rule

59(e), the motion tolls the time for appeal even if Rule 59 is not expressly invoked." (emphasis added.)

The basis for dismissal in *Coward Hund* was federal precedent (subsequently adopted by this Court in *Quality Trailer*). Likewise, the Court of Appeals here should have looked to and applied the federal courts' interpretation of 59(e) motions for tolling purposes. Federal courts recognize no judicious purpose in dismissing an appeal for filing a 59(e) motion that a party believes has arguable merit. This principle should be especially applicable where every single case decided at a time a 59(e) motion was filed held that such motions are not only good practice, but are required to preserve issues for appeal. IGT's 59(e) motion was proper on its merits because it raised issues required by error preservation precedent. However, even if the Court of Appeals disagreed, the 59(e) motion, seeking only 59(e) relief, was at least sufficient to toll the time for appeal.

4. THERE ARE SPECIAL AND COMPELLING REASONS FOR THIS COURT TO GRANT THE PETITION FOR WRIT OF CERTIORARI.

There are several important reasons why this Court should grant writ of certiorari in this case. The Court of [Appeals'] decision here adversely impacts not only IGT, but the entire bar, and all other litigants before the appellate and trial courts.

Most importantly, parties now have inconsistent guidance as to how error should be preserved when the trial judge's rulings are reasonably construed to leave some issues unresolved, or fail to make explicit rulings or simply fail to rule on the issues presented. Confusion also

arises because the decision here ignores the body of South Carolina law requiring a 59(e) motion when an order fails to explicitly address some or all issues. The Court of Appeals incorrectly determined that explicit rulings are only needed when Rule 52(a) requires findings of fact and law. The decision actually seems to declare that a 59(e) motion is never appropriate following a jury trial. Precedent from both South Carolina appellate courts holds to the contrary and requires 59(e) motions to preserve inexplicit rulings in jury trials and other situations where Rule 52(a) clearly has no application.

As a result of this new holding by the Court of Appeals, members of the bar are now left in the dark as to when, if ever, they should file a 59(e) motion. The Court of Appeals provides no guidance for that question, except to note that a 59(e) motion should not be used to ask the trial judge to "reconsider" an issue already presented and ruled upon by a post-trial motion. However, the Court of Appeals then follows that advice by noting that, "*The purpose* of Rule 59(e), SCRCP, to alter or amend judgment[,] is to request the trial judge to 'reconsider matters properly encompassed in a decision on the merits.'" *Arnold v. State*, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992) (citing James F. Flanagan, *South Carolina Civil Procedure*, 475 (2d ed. 1996)). (emphasis added.) Obviously, much confusion is created by the Court of Appeals' decision in this case.

Secondly, in addressing IGT's order, the Court of Appeals failed to consider the doubt raised by the trial judge's qualified rulings on IGT's issues – or at least the possibility that the order raised such doubts. Instead, the Court of Appeals artificially molded the facts in this case to inappropriately apply *Quality Trailer*.

The Court of Appeals conditioned the tolling provision of Rule 203(b)(1), SCACR, upon a retrospective determination by an appellate court of the appropriateness and necessity of a 59(e) motion. The Court of Appeals acted without any precedent and ignored federal precedent directly on point. If federal precedent had been applied to IGT's 59(e) motion, as it should have been, the motion would have been at least sufficient to trigger the tolling provision.

Finally, the unusual posture of this case raises serious questions concerning the efficacy of the Court of Appeals' decision. On September 20, 2002, IGT filed a Petition for Rehearing and Petition for Rehearing *En Banc* and Alternatively for Reinstatement and Certification. Until there was a ruling thereon, the Court of Appeals' decision was not final. The subsequent recusal of four members of that court, including one of the original panel members has deprived IGT any review of the decision.

Either a quorum was not convened to issue a "final" decision, or IGT has been substantively denied its right to a rehearing by the original panel and a rehearing *en banc* by the Court of Appeals. This Court has clearly held that the Court of Appeals may take no valid action without a quorum of three judges. In *State v. McMillan*, 349 S.C. 17, 561 S.E.2d 602 (2002), this Court stated, "under S.C. Code Ann. §14-8-80(d), three judges are necessary to constitute a quorum of the Court of Appeals, and a concurrence of the majority is necessary for reversal of the judgment below. This Court has recognized that no valid act can be done in the absence of a quorum." (citing *Care and Treatment of Matthews*, 345 S.C. 638, 550 S.E[.]2d 311 (2001) and *Gaskin v. Jones*, 198 S.C. 508, 18 S.E.2d 454 (1942)).

In *Garris v. The Governing Board of the S.C. Reinsurance Facility*, 333 S.C. 432 (1998), this Court dealt with the issue of lack of quorum on the Reinsurance Facility Board by stating, " . . . the common law rule that a majority of the whole board is necessary to constitute a quorum applies, and the board may do no valid act in the absence of a quorum. [internal citations omitted.] A member who recuses himself or is disqualified to participate in a matter due to a conflict of interest, bias, or other good cause may not be counted for purposes of a quorum at the meeting where the board acts on the matter." For the same reason, a judge who recuses himself from a panel cannot be considered part of the quorum.

Here, a member of IGT's three-judge panel recused himself prior to the decision becoming final. Accordingly, either the decision lacks efficacy and should be vacated, or this Court should review the decision pursuant to IGT's petition for writ of certiorari. Otherwise, the decision will have had no substantive review by any court.

CONCLUSION

The decision in this case has a broad effect not only on IGT, but on numerous other litigants similarly situated. Currently, there are many cases pending in the appellate and trial courts where 59(e) motions have been filed for the same reason IGT filed its motion. The issue now before this Court concerns subject matter jurisdiction, as it did in *Quality Trailer*. However, the misapplication of that decision exposes appellants to unjust determinations of their appeal. For the aforementioned reasons, IGT respectfully requests that this Court issue a writ of certiorari in this matter, reverse the decision of the Court of Appeals,

and hear this case on its merit pursuant to the Rule 204(b) transfer to this Court. (App. p. 329).

February 7, 2003

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RULE 203
NOTICE OF APPEAL

(a) Notice. A party intending to appeal must serve and file a notice of appeal and otherwise comply with these Rules. Service and filing are defined by Rule 233.

(b) Time for Service.

(1) Appeals From the Court of Common Pleas. A notice of appeal shall be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment. When a timely motion for judgment n.o.v. (Rule 50, SCRCP), motion to alter or amend the judgment (Rules 52 and 59, SCRCP), or a motion for a new trial (Rule 59, SCRCP) has been made, the time for appeal for all parties shall be stayed and shall run from receipt of written notice of entry of the order granting or denying such motion. When a form or other short order or judgment indicates that a more full and complete order or judgment is to follow, a party need not appeal until receipt of written notice of entry of the more complete order or judgment.

(2) Appeals From the Court of General Sessions. After a plea or trial resulting in conviction or a proceeding resulting in revocation of probation, a notice of appeal shall be served on all respondents within ten (10) days after the sentence is imposed. In all other cases, a notice of appeal shall be served on all respondents within ten (10) days after receipt of written notice of entry of the order or judgment. When a timely post-trial motion is made under Rule 29(a), SCRCrimP, the time to appeal shall be stayed and shall begin to run from receipt of written notice of entry of an order granting or denying such motion. In those cases in which the State is allowed to appeal a pre-trial

order or ruling, the notice of appeal must be served within ten (10) days of receiving actual notice of the ruling or order; provided, however, that the notice of appeal must be served before the jury is sworn or, if tried without a jury, before the State begins the presentation of its case in chief.

(3) Appeals From the Family Court. A notice of appeal in a domestic relations action shall be served in the same manner provided by Rule 203(b)(1). A notice of appeal in a juvenile action shall be served in the same manner as provided by Rule 203(b)(2).

(4) Appeals from Masters and Special Referees. The notice of appeal from an order or judgment issued by a master or special referee shall be served in the same manner as provided by Rule 203(b)(1).

(c) Cross-Appeals. A respondent may institute a cross-appeal by serving a notice of appeal on all adverse parties within five (5) days after receipt of appellant's notice of appeal, or within the time prescribed by Rule 203(b), whichever period last expires.

(d) Filing.

(1) Where to File. The notice of appeal shall be filed with the clerk of the lower court and with the Clerk of the Supreme Court in the following cases:

(A) Any final judgment from the circuit court which includes a sentence of death;

(B) Any final judgment from the circuit court setting public utility rates pursuant to Title 58 of the S.C. Code;

(C) Any final judgment involving a challenge on state or federal grounds to the constitutionality of a state law or county or municipal ordinance where the principal issue is one of the constitutionality of the law or ordinance; provided, however, in any case where the Supreme Court finds that the constitutional issue raised is not a significant one, the Supreme Court may transfer the case to the Court of Appeals.

(D) Any final judgment from the circuit court involving the authorization, issuance, or proposed issuance of general obligation debt, revenue, institutional, industrial, or hospital bonds of the State, its agencies, political subdivisions, public service districts, counties, and municipalities, or any other indebtedness now or hereafter authorized by Article X of the Constitution of this State.

(E) Any final judgment from the circuit court pertaining to elections and election procedure.

(F) Any order limiting an investigation by a State Grand Jury under S.C. Code Ann. § 14-7-1630.

(G) Any order of the family court relating to an abortion by a minor under S.C. Code Ann. § 44-41-33.

In all other cases, the notice of appeal shall be filed with the clerk of the lower court and the Clerk of the Court of Appeals.

(2) When and What to File. The notice of appeal shall be filed with the clerk of the lower court and the clerk of the appellate court within ten (10) days after the notice of appeal is served. The notice filed with the appellate court shall be accompanied by the following:

(A) Proof of service showing that the notice has been served on all respondents;

(B) A copy of the order(s) and judgment(s) which are to be challenged on appeal if they have been reduced to writing; and

(C) A filing fee as set by order of the Supreme Court;[1] this fee is not required for criminal appeals or appeals by the State of South Carolina or its departments or agencies.

(3) Effect of Failure to Timely File. If the notice is not timely filed or the filing fee is not paid in full, the appeal shall be dismissed, and shall not be reinstated except as provided by Rule 231.

(e) Form and Content. The notice of appeal shall be substantially in the form designated in the Appendix to these Rules. It shall contain the following information:

(1) The name of the court, judge, and county from which the appeal is taken.

(2) The docket number of the case in the lower court.

(3) The date of the order, judgment, or sentence from which the appeal is taken; and if appropriate for the determination of the timeliness of the appeal, a statement of when the appealing party received notice of the order or judgment from which the appeal is taken, or, if a cross-appeal, when the respondent received appellant's notice of appeal.

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[1] By order dated April 17, 1990, this filing fee was set at one hundred ($100.00) dollars.

(4) The name of the party taking the appeal.

(5) The names, mailing addresses, and telephone numbers of all attorneys of record and the names of the party or parties represented by each.

RULE 221
REHEARING AND REMITTITUR

(a) Rehearing. Petitions for rehearing must be actually received by the appellate court no later than fifteen (15) days after the filing of the opinion, order, judgment, or decree of the court. A petition for rehearing shall be in accordance with Rule 224, and shall state with particularity the points supposed to have been overlooked or misapprehended by the court. No petition for rehearing shall be allowed from an order denying a petition for a writ of certiorari under Rule 226, SCACR.

(b) Remittitur. The remittitur shall contain a copy of the judgment of the court, shall be sealed with the seal and signed by the clerk of the court, and unless otherwise ordered by the court shall not be sent to the court below until fifteen (15) days have elapsed (the day of filing being excluded) since the filing of the opinion, order, judgment, or decree of the court finally disposing of the appeal. If a petition for rehearing is received before the remittitur is sent, the remittitur shall not be sent pending disposition of the petition by the court. Where a petition for rehearing has been denied, the Court of Appeals shall not send the remittitur to the lower court until the time to petition for a writ of certiorari under Rule 226(c) has expired. If a petition for writ of certiorari is filed, the Court of Appeals shall not send the remittitur until notified that the petition has

been denied. If the writ is granted by the Supreme Court, the Court of Appeals shall not send the remittitur.

(c) Rehearing of Motions. The appellate court will not entertain petitions for rehearing on a motion or petition unless the action of the court on the motion or petition has the effect of dismissing or finally deciding a party's appeal.

RULE 226
CERTIORARI TO THE COURT OF APPEALS

(a) Authority of the Supreme Court. The Supreme Court, or any two (2) justices thereof, may in its discretion, on motion of any party to the case or on its own motion, issue a writ of certiorari to review a final decision of the Court of Appeals.

(b) Considerations Governing Review. A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons. The following, while neither controlling nor fully measuring the Supreme Court's discretion or power to grant review in general, indicate the character of reasons which will be considered:

(1) Where there are novel questions of law.

(2) Where there is a dissent in the decision of the Court of Appeals.

(3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.

(4) Where substantial constitutional issues are directly involved.

(5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

(c) Time for Petitioning and Filing Fee. A decision of the Court of Appeals is not final until the petition for rehearing has been acted on by the Court of Appeals. A petition for writ of certiorari shall be served on opposing counsel and filed with proof of service with the Clerk of the Court of Appeals and the Clerk of the Supreme Court within thirty (30) days after the petition for rehearing is finally decided by the Court of Appeals. An original and six (6) copies of the petition shall be filed with the Supreme Court. The copies filed with the Supreme Court shall be accompanied by the filing fee set by order of the Supreme Court.[1] No filing fee shall be required in criminal cases or petitions filed by the State of South Carolina or its agencies or departments.

(d) Content of Petition. The petition for writ of certiorari shall contain the following:

(1) Certification by counsel for petitioner that a petition for rehearing was made and finally ruled on by the Court of Appeals.

(2) The questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented

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[1] By order dated April 17, 1990, this filing fee was set at one hundred ($100.00) dollars.

to the Supreme Court. A question presented will be deemed to include every subsidiary question fairly comprised therein.

(3) A concise statement of the case, containing the facts material to the consideration of the questions presented.

(4) A direct and concise argument in support of the petition. The argument on each question shall include citation of authority and specific reference to pertinent portions of the Record on Appeal. Failure of a petitioner to present with accuracy, brevity, and clarity the information and arguments that are essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying the petition. The total length of a petition shall not exceed twenty-five (25) pages.

(e) Appendix. At the same time the petition is filed, the petitioner shall also file two (2) copies of the Appendix with the Clerk of the Supreme Court. The Appendix shall include the following:

(1) A copy of the Record on Appeal and brief(s).

(2) A copy of the decision of the Court of Appeals on which certiorari is sought.

(3) A copy of the petition for rehearing filed in the Court of Appeals and the Court's ruling on that petition.

(f) Return to Petition. Within thirty (30) days after service of the petition, respondent shall serve a copy of his return on opposing counsel, and shall file with the Clerk of the Supreme Court one original and six (6) copies of his return and proof of service showing that the return has been served. The return shall include an argument on each question and may include a counter-statement of the

case and of the questions presented for review. The total length of a return shall not exceed twenty-five (25) pages.

(g) Reply. The petitioner shall have ten (10) days from the date of service of the return to file with the Clerk of the Supreme Court an original and six (6) copies of a reply and proof of service showing that the reply has been served. The total length of the reply shall not exceed fifteen (15) pages.

(h) Consolidation. Where several cases that involve identical or closely related questions are sought to be reviewed on certiorari, the filing of a single petition for writ of certiorari shall suffice to cover all the cases.

(i) Consideration by the Supreme Court. The petition will be considered by the Supreme Court without oral argument. The petition may be granted or denied on any question presented. If the petition is granted, the Clerk shall notify each party or his attorney, specifying the question or questions to be considered, and the parties shall prepare briefs addressing the question(s). Petitioner shall have thirty (30) days from the date the petition is granted to serve three (3) copies of his brief on all parties to the appeal, and file with the Clerk of the Supreme Court fifteen (15) copies of his brief, along with proof of service. At the time he files his brief, petitioner shall also file thirteen (13) additional copies of the Appendix. Within thirty (30) days after service of petitioner's brief, respondent shall serve three (3) copies of his brief on all parties to the appeal, and file with the Clerk of the Supreme Court fifteen (15) copies of his brief, along with proof of service. Petitioner may file a reply brief. If a reply brief is prepared, petitioner shall, within ten (10) days after service of respondent's brief, serve three (3) copies of his reply brief on all parties to the appeal and file with the

Clerk of the Supreme Court fifteen (15) copies of his reply brief, along with proof of service. The briefs shall, to the extent possible, comply with the requirements of Rule 208(b). Oral argument shall not be permitted unless ordered by the Supreme Court.

(j) Costs When a Writ of Certiorari Has Been Granted.

(1) To Whom Awarded. Unless otherwise ordered by the Supreme Court or agreed to by the parties, costs shall be assessed against the appellant if the decision of the Supreme Court has the effect of affirming the judgment of the lower court or tribunal which was reviewed by the Court of Appeals. When the decision of the Supreme Court has the effect of reversing the judgment of the lower court or tribunal which was on appeal, costs shall be assessed against the respondent before the Court of Appeals. When the decision of the Supreme Court has the effect of affirming or reversing in part or vacating the judgment of the lower court or tribunal which was on appeal, costs shall be allowed only as ordered by the Supreme Court.

(2) Costs Allowed. The party entitled to recover costs may recover all those costs specified in Rule 222(b), to include the attorney's fee provided by that rule. Additionally, the party may, to the extent the party actually incurred these costs, recover: (1) the filing fee paid under Rule 226(c); (2) the cost of printing the Appendix under Rule 226(e) and (i); and (3) the cost of printing the party's brief(s) under Rule 226(i). The party may also recover an additional attorney's fee in an amount which shall be set

by order of the Supreme Court.[2] The allowance of additional costs will generally not be allowed except in the most extraordinary circumstances.

(3) Costs for Printing Irrelevant Matter. A party who has unjustifiably designated irrelevant matter to be included in the Record on Appeal shall not be entitled to tax the cost of printing this matter in the Record on Appeal or in the Appendix. Further, a party not otherwise entitled to costs under this Rule shall be entitled to collect the cost the party incurred for printing irrelevant matter in the Record on Appeal and/or the Appendix which another party unjustifiably designated to be included in the Record on Appeal.

(4) Motion for Costs. A party desiring costs to be taxed shall, within fifteen (15) days of the issuance of the remittitur, serve and file a motion requesting that costs be assessed under this Rule. The motion shall comply with Rule 224. If costs are being sought under (2) above, the motion shall be accompanied by a sworn, itemized statement of costs incurred in the form prescribed in the Appendix to these rules. Any return or reply to the motion shall be served and filed in the manner provided by Rule 224. The return may oppose the request for costs or seek a reduction of the amount of costs to be awarded. The remittitur shall not be stayed by the filing of a motion for costs.

(5) Taxation. Costs under this Rule shall be taxed by the Supreme Court. If costs are taxed, they shall become

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[2] By order dated July 24, 1997, the amount of attorney's fee was set at $1,000.

part of the judgment of the appellate court and shall be added to the remittitur.

(6) Applicability. Costs shall not be awarded in criminal cases or post-conviction relief cases.

RULE 59
NEW TRIALS; AMENDMENT OF JUDGMENTS

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the State; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in the courts of the State. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) Time for Motion. The motion for a new trial shall be made promptly after the jury is discharged, or in the discretion of the court not later than 10 days thereafter. In non-jury actions the motion shall be made not later than 10 days after the receipt of written notice of the entry of judgment or of the filing of an order disposing of the action, if no judgment has been entered.

(c) Time for Serving Affidavits. When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not

exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) On Initiative of Court. Not later than 10 days after entry of judgment, the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order.

(f) Time for Appeal; End of Term. The time for appeal for all parties shall be stayed by a timely motion under this Rule and shall run from the receipt of written notice of entry of the order granting or denying such motions. The time within which to make the motions under this Rule shall not be affected by the ending of a term of court or departure of the judge from the circuit, and the trial judge shall retain jurisdiction of the action for the purpose of hearing and disposing of such motion if not heard and disposed during the term. Except by consent of the parties, argument on the motion shall be heard in the circuit where the trial was held. The motion may in the discretion of the court be determined on briefs filed by the parties without oral argument.

(g) Judge to be Provided with Copy. A party filing a written motion under this rule shall provide a copy of the motion to the judge within ten (10) days after the filing of the motion.

Note:

This Rule 59 is substantially the Federal Rule. It is consistent with Code § 15-27-150. Rule 59(b) provides that if the motions are not made and heard during the term, the more precise and definite Federal practice of allowing 10 days after the entry of judgment to make the motion is more equitable. Rule 59(f) is added to provide that departure from the circuit does not deprive the trial judge of jurisdiction to rule on motions under this Rule and Rules 50, 52 and 60. It also provides flexibility for the trial judge to determine the motions on briefs without oral argument.

Note to 1986 Amendment:

In jury trials, post-trial motions are made promptly at the end of the trial, or at that time the court, upon motion, may grant an additional ten days to make them. These amendments to Rules 59(b) and (e) and (f) conform the language to that of Rules 50 and 52, and provide that the time for appeal commences upon the receipt of written notice of entry of the order disposing of such motions which was prior state practice, rather than the date when the court signed the order which is the practice in the federal courts.

Note to 1998 Amendment:

This amendment adds Rule 59(g). It is intended to help insure that the judge is promptly notified that the motion has been filed.